THE RENOVATION

OF

INTERNATIONAL LAW

ON THE BASIS OF A JURIDICAL COMMUNITY OF MANKIND

SYSTEMATICALLY DEVELOPED

BY

PROF. DR. D. JOSEPHUS JITTA
COUNCILLOR OF STATE ETC. AT THE HAGUE

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MARTINUS NIJHOFF
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PREFACE.

I have written my work during THE WAR. The idea of a collectivity of the States is interwoven allthrough my work, but, of course, the project of a League of nations, which has been elaborated during the armistice, could not be taken into consideration. This is, moreover, a subject-matter which can only be dealt with, in an experimental way, in future times. Besides, I dare say that my work does not fall short with regard to the plans of the day; so far as the juridical community of mankind is concerned, it is even ahead of its time.

MARCH, 1919. JITTA.

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Page 44, lines 19 and 25, for 14 read 15.

CHAPTER I.

OBJECT AND SCHEME OF THE WORK.

My object. I must apologize for referring, in these very first lines, to one of my former works. But that former work is the starting-point of this one. In one of my works published some years ago, on the *Method of Private International Law*, I have respectfully but decidedly rejected the basis, assigned by SAVIGNY to private international law. According to the opinion of this illustrious predecessor, private international law should be based on the community of *the nations*, united by regular intercourse. My conviction, however, is that the community of nations may exist, but that it is not the basis of private international law. The real basis of the said law is the juridical community of *mankind*. A system of reasonable principles for the international intercourse of men can only be built up on such a community. In my former work, I came, moreover, to conclusions, which greatly differed from the classical ones, as to the conception and the method of private international law. My work has often been criticized. I was asked how I dared to disagree with such an authority as SAVIGNY; this is a question not deserving any answer. It was also said that there was no essential difference between my view and that of the illustrious scientist. The last objection has induced me to make new investigations. In this work I hope to corroborate my opinion by means of thorough investigations, which is, of course, the best way to answer the censors. Moreover, I shall try to do a step forward by pointing out that the juridical community of mankind is also the basis of public international law, provided that the positive law of war, the rules of which are by no means to be deduced from reasonable principles of social life, be absolutely separated from public international law. In this way, I shall be able to unite the public and the private international law in a general sys-

tem. It is necessary to emphasize at once that I am not dreaming of an idealistic humanity. I take the human species as it is, with its positive law often in sharp contradiction with the reasonable principles of international social life; I take it with its noble and vile passions, which are of much greater influence, on the majority of men, than reason. I do not dream, I look about with my eyes open, and, according to the saying of SPINOZA, I try to understand. The reasonable principles, in my opinion, are certainly quite subordinate to the positive law, but I maintain and I hope to prove that these reasonable principles have not only a subsidiary force and a large significance for the construction of the positive law, but that they are the touchstone of the righteousness of the positive law and the final aim of its evolution. I am not going so far as to maintain that stating a mere contradiction between the reasonable principles and the positive law is a conclusive indication of the existence of an evolution, but I hope to make clear that, when there is no evolution, there is an impediment, the nature of which can be ascertained and the power of resistance of which can be measured with tolerable accuracy.

Mankind as a community de facto. Mankind is undoubtedly a community *de facto*, producing positive and negative duties of each member of the community, towards his fellow-members and towards the community as a social body. Men are born, live and die in dependence on their fellow-men. Without such a society, THE SOCIETY by excellence, as the Holy Book is THE BOOK, life is not worth living. Society does not only make a man dependent on the contemporaneous generation, it also connects him with his ancestors, the hereditary qualities and faults of whom will influence him; it connects him with his posterity, in which he is living indefinitely. The individual may be indifferent to the qualities or faults of his posterity, to society these qualities and faults are not immaterial; common dangers, the roots of which are to be found in the past, are threatening both the present and the future generations. Religious feeling, morality, science and art are common goods of mankind. The membership of the community of mankind is innate and inalienable. Society has no other limit, as to infinite space, than the planet itself, it has no limit, as to time, than

the origin and the extinction of the human species. Mankind, as the personification of the human species, is a living, even an indefinitely living being. Social life necessitates a reasonable order, and this necessity is the basis of *reasonable principles of international social life* — or, to be short, reasonable principles — imposing duties on all the members of the human species and granting the social body, viz. personified mankind, the right of compulsion, correlate to these duties. The compulsive power of the social body is exercised *de facto* by the States, acting in isolation or as a collectivity, but, if the existence of the community of mankind is denied, the right of the State must be either postulated or it must be founded on a superhuman gift, while mankind, according to human nature, is possessing the highest compulsive power, as a necessity of social life. The reasonable principles of social life, are, in this sense, the foundation as well of private as of public international law. I am fully aware of the fact that the social life of mankind is not immutable, that the reasonable principles are changing with it, and even that the reason, which qualifies the principles, is our poor and fallible human reason, but the only conclusion I am deducing from the foregoing considerations is that the reasonable principles are not to be found by philosophical abstraction, but by observation of life's phenomena.

Mankind as a juridical community. The existence of a community de facto of mankind is generally admitted, but it is often denied the character of a *juridical* community, on account of the pretended lack of an able social compulsory power. I beg to say that here we have to do with a misapprehension, the origin of which can be easily pointed out. If the true basis of international law were the community of *nations* — or even of the less or more civilized nations — the lack of a central compulsory power on the nations, members of the community, would undoubtedly be felt. But if we take the community of *mankind* as basis, it is clear that there the lack of a compulsory power does not exist. There are even three such powers, the two first of which are absolutely undeniable. The first is the State, the local representative of the public power of mankind; the second is the union of several States, representing mankind on a territory larger than a State, the

third is the collectivity of the States, able to exercise the full power of mankind on the entire human species. The third power is rudimentary, but not fictitious. In order to use a clear word, I prefer the expression *collectivity* of the States to the expression *community* of the States, the latter would lay too much stress on duties of the States towards eachother, and too little on the other relations, viz. those between States and men and the mutual relations between men.

The unity of international law. After separating public international law of the positive rules of war, both public and private international law appear as an unity. They have the same basis and the reasonable principles have the same signification for both. Their conceptions show that they have elements in common. Public international law is not exclusively a complex of relations between nations, it is the public law, considered from the point of view of a community larger than a State, a community embracing, in its extreme extension, all mankind; private international law is not exclusively the science of the conflicts of laws, it is the private law considered from the same point of view. The social powers, entitled to compulsion, are the same in the two branches, viz. the State in isolation, the union of several States, and the collectivity of the States. The method which is to be applied to both branches may be the same too. It is evident that the power of the State, acting in isolation, is not so great as the power of a union or of the collectivity in matters relating to international life. The State, which, in its isolation, is unable to change the positive law of another State, is often obliged to be satisfied with a relatively reasonable solution under the circumstances of the case. Hence a division of the method of international law into two parts, an individual or special one in which the State is acting in isolation, and a universal or general part, in which a union or the collectivity is active. It may be that the individual part is of greater importance to private international law and that the universal part is so to public international law, but this is only a consequence of the differences existing between purely private law and purely public law.

Scheme of the system. It is my intention to abstain, as much as possible, from reasonings and polemics, and to follow an experimental

manner of investigation. With regard to the principal questions of public and private international law I shall in the first place compare the reasonable principles with the positive law, in order to put the latter to the test of the former. If there is a discrepancy, I shall see if there is an evolution of the positive law, and if not, I shall try to find out what may be the nature and the measure of the impediment. The second chapter of this present work, containing the system, will be divided into two parts, the first of which will be devoted to public international law and the second to private international law. I make a distinction between the said two parts, without making a radical separation. To the public international law I reckon the relations, by which society, as a whole, is predominating, and to the private branch, those by which the members of society, i. e. the men, are predominating In this way I reckon fiscal law, criminal law and jurisdiction, in general, to the public branch, and bankruptcy, for instance, to the private one. As to the sections and paragraphs of each part of the system, I refer to the Index. But, before treating the development of the system, I must make a few preliminary abservations.

The positive rules of the law of war. It is only my intention to justify why I did not take up the said rules in my system. In order to do it, I have added to the system an appendix (Chapter III) containing a few considerations on the positive law of war.

The egotism of the States. Distinguished scientists are sustaining the thesis that such egotism should be the foundation-stone of public international law, or, as they call it, of the law of nations, an expression which I shall avoid as much as possible, on account of its narrowness. I hope to show, *in my experimental way*, that we have to do here with another misapprehension. The selfishness of the States is, in the positive international law, a powerful psychological motor, but it is, on no account, either a touchstone of righteousness, or an aim of evolution.

The burden of the subject-matter. It is a good weight, but I hope to avoid overloading. In the first place, I have limited my work to a system, leaving enough space for a concise explanation of the questions, without requiring as many monographies as there are paragraphs. In the second place, I abstain from bibliographical reviews, notes, and,

as far as possible, from quotations. Bibliographical reviews are to be found in treatises and special works. I pay a general tribute of homage to all my predecessors and a special tribute to my countryman Prof. DE LOUTER; I am a son of my time and a disciple of my teachers.

The causticity of some of the materials. I shall have to handle many caustic, I dare say even explosive materials. I have to deal with the patriotic idea of the absolute sovereignty of the State. I shall have to measure the influence of racial affinities and prejudices, of religious feelings and religions, of social-political parties. I cannot entirely refrain from speaking about the war. I hope I shall be prudent. I am not without fear, but I go on with my fear all the same.

The use of a language. I feel obliged, as a good patriot, to say why I do not exclusively use my native tongue. I thought the nature of the subject-matter would justify an appeal to the international public. The jurists of the Netherlands, in former centuries, have, out of the same consideration, written in latin, but that would not do in our days. And so considering that, in my mother-country, the study of foreign languages is an essential part of a good education, I resolved to use, beside my beloved native tongue, what we call *the three foreign languages*. None of my foreign editions is a translation, I tried to penetrate into the souls of a large group of nations, with my own words. If I am able to use these three foreign languages with tolerable aptitude, I owe it to my national education, and if it should be at all praiseworthy, I transmit the praise to my mother-country. But I wish to point out that, in the various editions, the contents are on a whole the same; in the editions written in a foreign language, I did not exclusively or even chiefly pay attention to the positive law and the practice of the country, the language of which I used. If I had done so, I should have broken the unity of my work. In the simultaneous use of several foreign languages I have found a twofold self-control, viz. in controlling the exactness of the words, as I often had to consider how the same thought could be expressed in various terms, and in aiming at conciseness, as it would be senseless to say things four times, which could be left unsaid without any detriment to the general aim.

CHAPTER II.

THE SYSTEM.

FIRST PART.

Public International Law.

First Section.

THE GENERAL DIRECTION OF PUBLIC AFFAIRS.

§ 1. *The Sovereignty of the State and the Sovereignty of Mankind.*

The sovereignty of the State. According to the reasonable principles of international social life, sovereignty, the paramount power in the juridical community of the human species, belongs to mankind, the personification of the human species, and, strictly speaking, exclusively to mankind. As, however, in the present state of the world, the general direction of public affairs is exercised by the States, as the representatives of mankind, there is no objection, although the power of the States is a derived power and a creation of historical events, to giving the power of the States the qualification "sovereignty", provided that we take the word "sovereignty" in a peculiar sense, the sense of *an immediate tenure of mankind.* When we use the expression in the abovementioned sense, we are able to compare the qualifications, appertaining to the sovereignty of the State according to the reasonable principles, with the qualifications granted to the same in positive law. Even the philosophical jurists, according to whose opinion every human authority is subordinated to the sovereignty of THE LAW, cannot raise any objection against the use of the expression "sovereignty of the State", in the above mentioned sense, as the two ideas "LAW" and "THE REASONABLE PRINCIPLES OF SOCIAL

LIFE" are getting so near to each other, that they may be considered as coinciding.

The qualifications to be given to the sovereignty of the State according to reasonable principles. The sovereignty of the State, according to the principles, is a derived, a relative and a limited one. It is derived from the sovereignty of mankind, and, as such, it is only a relative one. I call *"juridical limits"* those limits which are to be deducted from the derived and relative character. The sovereignty of the State has, besides, two other limits. It is only exercised in a part of the earth, and has therefore *"territorial limits"*; it is only exercised on a part of the human species, and has therefore limits, which I call *"personal limits"*.

The qualifications of the sovereignty in positive law. The existence of territorial and of personal limits is generally admitted, although the exact tracing of the said limits, in positive law, does not always converge with the reasonable limits. But it is often denied with great stress that the sovereignty of a State should be a derived and a relative one, and that, therefore, it should have *juridical* limits. It is often asserted, as a point of firm and constant religious faith, that the sovereignty of the States is by no means a tenure of mankind, but an immediate grant of God, the omnipotent ruler, and that it is therefore an absolute and an unlimited power. The doctrine, according to which there should be a human power with a higher title than the State, is also rejected very often with indignation, as an offence against patriotism. I therefore feel obliged to compare, with prudent impartiality, the qualifications, granted by reasonable principles, with those admitted in positive law. I have to add that in positive law we shall find a fourth species of limits of the sovereignty, which limits may be designed as *"political limits"*.

The religious and patriotic impediments of the evolution of positive law, as to sovereignty. I certainly do not underrate their power of resistance. As to religious feelings an interchange of thoughts between believers and sceptical men is excluded, but, as to patriotic feeling, I maintain that I myself am a good patriot and I hope to show, in my experimental way, that the reasonable principles do not take

away a hair's breadth more from the sovereignty of the State than the reasonable order of international social life is requiring. A "society of nations", moreover, would not restrict the autonomy of a nation to a smaller extent.

§ 2. *The juridical Limits of the Sovereignty of the State.*

The principle. The sovereignty of personified mankind, on the human species, is only existing for the sake of the reasonable order of social life. Therefore the sovereignty of mankind is not absolute, it has juridical limits, and as the sovereignty of the State is a tenure of mankind, it has juridical limits too. These juridical limits are to be traced in a triple direction, viz. as to the relations between the State and the individuals, as to the relations between the State and mankind, and as to the relations between a State and an other State.

The State and the individuals. The juridical link between the State and an individual may have four degrees; it may be a very strong, a strong, a feeble and a very feeble degree of strength. It is very strong when the individual is in the possession of political rights in the State, when he is a citizen or, according to a somewhat antiquated expression, a subject. It is weaker but not without force, when the individual is only domiciliated in the State; it is becoming still feebler when the individual is only resident *pro tempore*, and it is very weak when the individual only takes part in the local business-life, without his personal presence. In each of the four cases, however, there is a link. The State, as the local representative of mankind, has duties towards the individuals, which duties are increasing according to the strength of the link, whilst the rights of the State, correlate to its duties, are increasing in the same measure. The individual has an authority over his own personality, which may be called, in a peculiar sense also, personal sovereignty. The State has to respect the personal sovereignty of the individual. Only for the sake of the LAW, i. e. the reasonable order of social life, the State may restrict, as far as it is necessary, the personal autonomy of the individual. That is the reasonable limit of

the sovereignty of the State, with relation to individuals. The duties of the State towards individuals are existing, even when the individuals are not its "subjects". The State has direct duties towards the individuals, only because they are men, members of the human species, and not because they are subjects of another State; therefore the said duties are independent of reciprocity and do not admit retortion. These duties are the reasonable foundation and justification of the sovereignty of the State. But I am fully aware of the fact that positive law is not in accordance with the principles. Even in the relations between the State and its own subjects, also in the domain of the pure municipal law, the existence of juridical limits of the sovereignty of the State is scarcely admitted, and, as to the relations between the State and aliens, positive law does not go any farther than to the admission of the so called *comitas juris gentium*, a latin, not easily translatable expression, originally implying only a kindliness *between States*, so that reciprocity was a condition and retortions were absolutely lawful. We shall see however, in many parts of the system, that the *kindliness towards nations* is gradually evoluating in the direction of the *conscience of a duty towards men*. The interest of the State is a moving-spring in this evolution, but not its basis.

The State and mankind. The State, the sovereignty of which is derived from that of mankind, has a double duty to fulfil towards mankind, a duty of abstention and a duty of action. It has to abstain from measures constituting a violation of the reasonable order of the international social life; it has to act when the said order is requiring an action. These duties are not duties towards other States, but duties towards mankind, independent of reciprocity. Positive law does not admit the principle of these duties, but, in practice, as we shall see in the system, they are often fulfilled. It is, at least, the beginning of an evolution.

The State and the other States. The collectivity of the States is entitled, on the entire planet and on all the members of the human species, to the full sovereign power of mankind. This common possession is the foundation of a society of the States, and this society is creating reasonable duties between the "partners". These duties are, in the

first place, the duty of recognition, and in the second place the duty of collaboration. Each State is, according to the principle, bound to *recognize the other States as local powers,* representatives of mankind. Hence, the acts of foreign authorities are official acts, foreign laws are laws, and foreign judgments are judgments, everyone of them in their reasonable sphere of competency. Each State is bound also to collaborate with the other States, and to take by mutual agreement the measures required for the maintenance of the reasonable order of international social life. Both duties are juridical limitations of the State's sovereignty. Positive law does not admit the above-mentioned duties, as real duties, but we shall meet, in the system, distinct signs of evolution in several important points.

§ 3. *The territorial Limits of the Sovereignty of the State.*

Preliminary remark as to the relation between the territorial and the personal limits. In the present paragraph I only have the territorial limits in view, and I disjoin these limits from the so-called personal limits. I am doing this only on methodical grounds. In reality, according to the principles as well as in positive law, the sovereignty of a State has both territorial and personal limits. A State can no more be conceived without a part of the solid surface of the earth, constituting its territory, than without a part of the human species, as its population. The territory is, in a certain sense, to be called the *corpus rei publicae,* whilst the population, united by national feeling, possesses the *animus rei publicae.* Both limits are in accordance with the reasonable principles, a complete centralization of mankind would be unreasonable. It is evident that both limits are to be traced reasonably.

Is it possible reasonably to trace the territorial limits of the States? It is a fact that the expressions "natural frontiers" or "reasonable frontiers", have been exceedingly abused in martial politics. But, as an impartial observer of the phenomena of life, I am inclined to admit that frontiers, deserving the said qualifications, may exist.

But their measurement is by no means the desire of a conqueror, who calls "natural frontiers" the line which suits him on whatever ground it may be. In tracing the boundary lines of political groups of men, we shall have to avoid too great a subdivision as well as too great a centralization. The continents may be considered, in the first place, as political unities. But on the continents themselves some lines may be traced, harmonizing with the conception of natural frontiers; I am thinking of the larger islands or peninsulas, or of the range of higher mountains, which mark out the basins of the oceans. I do not add the larger streams, as these are not natural demarcations, but God's waterways, intended for the common use of mankind. But the existence of natural lines of demarcation is only a small part of a reasonable solution of the question, the spirit of the population is undoubtedly of greater importance than a coastline or a range of mountains. Perfection will only be attained if every State has a sound geographical constitution as well as a good constitution in a moral sense, the latter being constituted by a common political ideal of the population. Only when both conditions are satisfied the *corpus rei publicae* will harmonize with the *animus*. But if such an idealistic solution may be satisfactory to the scientist, who systematically tries to cut the continents to pieces at his writing-desk, the observer of the phenomena of life must become convinced that a perfect solution is not always obtainable, and that we must content ourselves with the solution, which is the best in the circumstances of a case. It is not possible, on one side to recognize as a sovereign State each district or each municipality, the population of which has the desire to form such a State, on the other side it is even impossible to divide regions with a mixed population, in such a manner that every group obtains sovereign rights. It is necessary, in such cases, to constitute States with a mixed population. The solution, which relatively is the best, is attained then, when each distinct group has autonomy with regard to its own interior affairs, and when the direction of the common affairs is centralized. The *corpus rei publicae*, in such cases, is one whole in a geographical sense, but the *animus* is bifurcated just as it is in a confederation, in so far that there is a certain particularism in each

group, and a common national feeling which combines them all again.

How have the present frontiers been formed? They have not been traced with regard to the general welfare. Geographical lines have had their influence, national feelings also, but violent conquest has been the main factor. Historical causality weighed the territorial and the personal elements, but Mars threw his sword upon the scales. So the modifications, registered in the books on history, may have been effective in the direction of reasonable principles, — the victorious swordbearer will readily believe it — but the contrary may also be the case. It has often been asserted that the finger of the Almighty has traced the boundaries of the States; being a matter of faith it cannot be discussed, but the assertion is, in a certain sense, an acknowledgment of the fact that human reason cannot fathom causality.

May an evolution be expected? Modifications may certainly be expected. There will be political unions and secessions, modifications of the boundary-lines, constituting ameliorations or making the things worse. But I confess that I do not expect, that the martial "annexionistical" and "disannexionistical" passions will soon disappear.

The juridical effects of modifications of the political frontiers. Reasonable principles and the practice of positive law are here pretty well in accordance with each other. According to the principles a transmission of the territorial sovereignty must not encroach upon regularly acquired rights. This principle is generally followed. Even the feelings of the population are sometimes taken into consideration, by means of a personal, unconditional or conditional, option. Many exceptions confirm both these rules in use. I must mention, but only in passing, a series of juridical institutions of private law, which are sometimes put into practice in international matters, with a political aim, on the territory or in parts of the territory of a State. I am thinking of the exchange, the lease, the joint ownership, rural servitudes, mortgage, etc. The denominations sound very peaceful, but when such institutions are regulated by political deeds, the deeds are written with blood and the writing is dried with gun-powder.

Various expressions, connected with "territory" and used

in the language of international jurisprudence. They are mostly figurative expressions. Some waters are sometimes called "territorial" waters, and one might also speak of a "territorial" column of air. Such expressions are without theoretical danger; nobody will found a building on "territorial" waters. Other expressions, as "territorial" or "exterritorial" things or persons, are in so far not without danger that one might try to protract the figure *ad consequentias*. We often hear that ships are floating parts of a territory, and a similar fiction might be applied to airships. Some persons are also called "exterritorial". In the treatises relating to the so-called law of nations such fictions have been thorougly discussed. In my mother country a very extensive monography on jurisdiction in international matters was published some years ago by DR. L. VAN PRAAG, and the danger of deducing the most extreme conclusions from the said figurative expressions was emphasized. The matter, moreover, is more closely connected with "jurisdiction" than with "territorial limits" and I hope to revert to the subject in the section devoted to jurisdiction.

§ 4. *The personal Limits of the Sovereignty of the State.*

Why do I consider "nationality" as the main point here? I beg to remind that, in § 2, I have discussed four links, which may exist between a State and an individual. But, as to the subject-matter of the present paragraph I have the intention to submit the "nationality" to a special investigation, whilst the other links will be discussed in the sections devoted to jurisdiction, criminal law, civil law, etc. In the domain of public international law, nationality is a far more important matter than domicile. Many and many juridical consequences are to be deduced from "nationality". And, last not least, a comparison between the reasonable principles and positive law on one side, and between the various municipal regulations of the acquisition and the loss of a nationality on the other side, will be extremely fruitful.

Nationality according to reasonable principles. According to these principles, nationality is founded on national feeling or patriotism. The characteristic element of national feeling is the pleasant sensation,

excited by the consciousness of being a member of a political group of men, which group is existing as a State or has existed and is still living in the memory of the individual. The main object of patriotism is formed by the other members of the group; the feeling is also directed towards every thing, which is valued as a common treasure by the members of the national group, viz. the territory, the language, the glory, etc., even the dynasty or the real or imaginary purity of the blood. In former times the protection of a national deity was also an inestimable treasure of a nation. The revival of such a thought we sometimes find in martial poetry. National feeling proceeds, on an atavistic basis, from the influence of education and surroundings; *it is not submitted to the rules of logic, because it is a feeling.* National feeling is undoubtedly a school of altruism, and a powerful moving-spring of the noblest emulation. In the struggle for life, a struggle which, in a reasonably ruled community, is only to be fought under the aegis of the law, patriotism is a link of friendly alliance. All these consequences come from the same cause: the pleasant sensation excited by the prosperity of the beloved country-men. As we have seen in § 3, national feeling is consistent with a regional patriotism or with a certain particularism in a State. National feeling is by no means incompatible with cosmopolitism. Cosmopolitism is a juridical thought, patriotism is a feeling, a concentration of the love directed to one's fellow-beings. Only when patriotism takes the form of hatred to aliens, so that the adversity of aliens is the source of a pleasant sensation, such incompatibility is obvious. As long as national feeling is not extinguished, the juridical link between a man and his mother-country holds out even when the individual is domiciliated abroad. Only when a former citizen has established his domicile *cum animo perpetuitatis* in another country, and has formed a friendly link with it, the national link is dissolved, as its reasonable basis has disappeared.

Nationality in positive laws. Positive laws do not absolutely deviate from the reasonable principles, but, as the interior feeling is not fit for an official investigation, the positive laws have deduced the nationality from exterior elements, which may be an object of immediate evidence in civil or criminal courts, and the effect of which is

to make the existence of a national feeling probable. These exterior elements have been the subject-matter of many able treatises, published in my mother-country and abroad, treatises to which I modestly refer. I only beg to remind the reader that the two most important of these elements are the birth-place and the blood, two elements which, as we know, do not always coincide. The paternal and the maternal blood may form two discordant elements, and when the child is illegitimate, it may be reckoned as well to the nation to which its mother belongs, as to that of its father, perhaps even better so. Very often the laws have enacted that marriage changes the nationality of the woman, a rule which is based, to a fair extent, on the idea that the husband's influence and the surroundings of the common home will modify the wife's feelings. Naturalization, both in itself and with regard to the wife and the children, is not regulated in the same way everywhere. The same thing may be said about the loss of a nationality, with or without the acquisition of a new one.

Difficulties arising in practice. They are generally known and they arise, for the greater part, from the discrepancy of the positive laws. The nationality of an individual may be equivocal; he may possess the elements of several nationalities; it may be that he has no nationality at all. Evidence, both in a positive and in a negative sense, is exceedingly difficult. Contradictory judgments may be pronounced in the various States involved in the difficulty. No supreme court is in existence.

Are the germs of an evolution perceptible? The organization of the world, on the basis of reasonable principles, does by no means involve a disappearance of national feeling. On the contrary, the national feeling, a comfort for the noblest hearts, is much more powerful, as an inducement to social virtues, than cosmopolitism, a thought as cold.... as a thought. But it would be desirable to bring greater harmony between national feeling and the juridical elements of nationality. Such an endeavour is by no means easy. A relatively reasonable solution would be obtained if the acquisition and the loss of a nationality could be regulated in a uniform manner in the various countries. On the basis of the blood-principle such a result would not be unattain-

able; some international treatises have established a few regulations in this sense. But, in the present state of the world, nationality is closely connected with many political duties and rights, and this is certainly an impediment to a general international agreement with regard to the acquisition and the loss of a nationality. The impediment would be much greater still if a supreme court were suggested, to settle questions concerning legitimate or illegitimate filiation, naturalization, etc. A more radical solution of the material part of the question, a solution by which the influence of birth-place and blood would be decreased and that of education and surroundings increased, would be scarcely taken into consideration in our days. The world is not yet ripe for it.

§ 5. *Political Limits of the Sovereignty of the State.*

Preliminary remark. A political organization of the continents would be a measure, taken in the general interest of mankind. A continental public power would consequently be placed between mankind and the States. The continental sovereignty would then be a political limit of the sovereignty of the States. But such a continental centralization is purely hypothetical; it is not an object of comparison. I only mention it in passing. There are other political limits, really existing in positive international law, and only in that law, which are to be discussed briefly. I remark, moreover, that personal unions are not concerned here.

Federations, the members of which retain a limited sovereignty. There are many federative forms, and in the treatises a distinction is often made between "confederated States" and "federal States". These qualifications are gradations of cohesion. In all federations there is a central power, and when the sovereignty of the central power is x, that of the members of the federation is S—x. A federation may, in the long run, acquire such a degree of cohesion that the members become similar to provinces with local autonomy; a secession may also take place. The question if a State, being a member of a federation, is entitled to withdraw from it, is a thorny one. It will be

sufficient, with the object of this system in view, to point out that the reasonable principles do not give an answer to this question, which entirely depends on positive law; the only way out is a relatively reasonable construction of the federal agreement. This construction may be the object of a dispute and the cause of a civil war; the construction of the winner will then be the best. If in a federation there is perfect harmony between the local particularism and the general patriotism, such a federation may be considered as the ideal picture of a world's federation, but it must be emphasized that a "society of nations" is not necessarily a federation.

Colonial empires. Colonies may be absolutely without any sovereignty, or they may possess a limited one, the metropolis being paramount. A peculiarity of a colonial empire, as contradistinguished from a federation, is, that a colony is very often situated in another continent than the metropolis, so that, if the colony has some political interests in common with the metropolis, it may also have interests in common with the colonies or States, situated in the same continent as itself; the latter interests may be in opposition with those of the metropolis. In our times, there is certainly an inclination towards the greatest colonial autonomy, and the old doctrine of customary international law, purporting that the colony has no personality in the so-called "law of nations", and that it is therefore represented by the metropolis in international matters, will at length have so many exceptions, that it will be overruled. Without wishing to prophesy, the future destiny of the colonies may be indicated by a dilemma. They will either form a unified realm with the metropolis, or they will become independent and constitute unions with the other political groups of the same continent. The second alternative does not at all exclude the maintenance of friendly relations between the former metropolis and the former colony.

Protectorates, suzerainties, spheres of influence, etc. The colonial and economical expansion has created such relations. Positive law admits semi-sovereignties and a complete scale of fractions. But such creations of positive law are not fit for a comparison with reasonable principles, the more so because the political situations of this

kind are often regulated in such a way that the "protected" State will possess a maximum in apparent sovereignty and a minimum in reality. If the paramount power of the protector is exercised with delicate skill, the unstable equilibrium may last for centuries. But, as it is unstable, things will most probably finally come to an end.

Perpetual neutrality, guaranteed or not guaranteed. It is a creation of positive law and especially of the positive law of war. According to reasonable principles, the sovereignty of the perpetually neutral State is entire and unlimited. It is not at all S—x.

The international position of the Holy See. I only wish to point out, with the greatest deference for the eminent head of the Roman Catholic Church, that the question entirely belongs to the domain of positive law.

§ 6. *National Offices with an international Task.*

Explanation of the denomination. The offices, which I have in view here, are national offices, but their task is, for a good deal at least, relating to international social life. This part is based especially on international customary law. The national offices with an international task are taking the place of a collective international administration, the existence of the latter being only a hypothesis.

Sovereigns and other heads of States. The national laws may grant the power of representing the State in its relations with other States, to the national dignities quoted in the rubric. With regard to this power, I beg to remind the reader that a State, as we have seen in § 2, is bound, in conformity with the principles, to recognize, within their reasonable competency, the men or bodies qualified as public powers according to the laws of other States. Hence the sovereigns and even the elective temporary heads of States are to be recognized as representatives. It is clear that the point is a very important one for the conclusion of international treaties. The power of binding the State may be submitted to conditions by the national law of the country represented. Such conditions are not unknown to the other States, and hence the power of representation depends on the said conditions,

both according to the doctrine, purporting that the power of a representative is limited by *the manner in which it is granted*, and according to the doctrine that *the confidence, raised by the manner in which the power is granted, is the true measure.* Customary international law grants to the sovereigns stricto sensu and to the Pope, privileges connected with their internationally recognized offices. As far as presidents of republics are concerned, their equalization with the heads of dynasties may be considered in our days as being admitted by a general custom. The same thing cannot be said with relation to the half-sovereigns or other rulers, exercising only part of the sovereignty; their international position is an ambiguous one and it will remain so for a long time, as there is neither a reasonable principle nor a settled custom which may be applied to it.

Diplomatic envoys. They fill up large chapters in the treatises on the so-called law of nations, but here a rubric will be sufficient, not because I should be inclined to deny their importance, but because the customary and written law, relating to the various envoys, are to be found in the works of my predecessors. The diplomatic officials, although national with regard to the State which they represent, have international functions in the common interest of the members of the human species, as agents of the collaboration of the States. Hence, the inviolability of the diplomatic envoys is in full accordance with the reasonable principles. Positive law, which is for the greatest part a customary law here, has confirmed the reasonable principles as to the inviolability but it has also given a greater precision to the rules concerning the envoys. These rules are relating to the right of sending envoys and the duty to receive them, to the so-called exterritoriality of the envoys and the privileges connected with it, to the official and not official persons, attached to the office, to the house and to the family of the envoy, etc. As to the positive regulations, I refer to the text-writers. Only one observation must be made. There are many gaps in the positive law, relating to diplomatic envoys. In so far as the gaps cannot be filled up by means of a construction of the reasonable principles, they remain gaps. An appeal to the text-writers or to preceding cases, which latter do not bear the character of a custom,

denotes a *"horror vacui"* the only effect of which is that it discloses the *vacuum*.

Consuls. In general, I beg to refer to the clever books written on the matter, and to the observations made under the foregoing rubric. The reasonable principles have been confirmed and developed in positive law, especially in international treaties. I have to emphasize here two things. The first is relating to the so-called "capitulation-countries" in which the subjects of the State, to which the consul belongs, are generally submitted to the jurisdiction of the consul. It is an old institution, which is of great historical importance, but which seems destined to fall into abeyance. Mixed courts, existing by exception, are only a measure of transition. The second thing, which deserves the reader's attention, is the political position of the consuls in countries that have nothing to do with the so-called capitulations. In so far as the consul is only a commercial agent of a foreign country, and is only exercising the functions connected with shipping and commercial intercourse, there is no special observation to be made, but more and more consuls are exercising a quasi-administrative power on foreigners, domiciliated in a country, and being subjects of the State of which the consul is the agent. The consul has to record births and deaths, to conclude marriages, to fulfil the functions of a notary public, to be super-guardian of infants and lunatics, even to represent the heirs of an estate, etc. This mission of the consuls is increasing more and more in our times, but I take the liberty to say that such an extension is not an evolution in the good direction, and that probably a reaction will follow. The foreign colony, ruled by foreign laws under the authority of a foreign official, is a small — sometimes a large — State in the State, impairing the unity of social life in the State and the unity of public registration of juridical facts. The question of the consular jurisdiction is closely connected with the predominance of the principle of nationality in private international law, a principle which will be discussed thoroughly in the second part of this system.

§ 7. *The general Direction of public Affairs of Mankind.*

The principle. Administrative measures, the influence of which

may extend itself over more than a State or even over all mankind, may be necessary to insure reasonable order in the community of mankind. The complex of such measures is called international administrative law. It must be observed, however, that international measures of administration do not always require an office constituted by a collective act of several States. Uniform and co-ordinated *national* measures, elaborated in common, may be quite sufficient; their effect upon international social life may be the same as that of a supernational office. It is only when co-ordinated national measures are unable to attain the result, because it is necessary to take, from a central point, immediate measures operating everywhere, that a real international office, appointed by the collectivity of the States, will be required. According to the principles, it is the duty of the States to appoint it in such a case. The qualification that a measure belongs to international administrative law, does not depend on the fact that the appointment of the official is national or international, but exclusively on the extension of the field, in which the measure is in force. Administrative international law is administrative law, considered from the point of view of a community larger than a State.

The positive law. It is in so far partly in accordance with the reasonable principles, that uniform and co-ordinate national measures, the effect of which is the same or nearly the same as that of an ordinance emanating from a central authority, are not at all rare. We shall find many and many examples of it in the next sections of this chapter. Here I shall only mention the measures for the prevention of collisions at sea. Very often we shall see that the States are obliging themselves, by an international treaty, to enact uniform or co-ordinate national regulations, the type of which is inserted in the treaty. Measures relating to the labouring classes may be mentioned here. But when there is question of obtaining a strict centralization, and of appointing an office with supranational powers, by common agreement, the objection that the States would have to sacrifice a part of their absolute sovereignty, is an impediment of the evolution. The appointment of a real supranational administrative Court, acting as a Supreme Court of the World, meets with the same impediment.

May the germs of an evolution be ascertained? I am inclined to give an affirmative answer, but the germs are very, very small, almost microscopic. States sometimes appoint mixed commissions, with a strictly limited authority. The authority of international fluvial commissions, appointed by the States the territories of which are crossed by international rivers, are a more pregnant example. And in some international treaties, the field of action of which includes a large part of the world, e. g. the universal postal union, we find international offices, appointed in conformity with the treaty, offices which may be considered as the small and modest germ of an international administrative centralization. A Supreme Court of the World, as was said before, will not easily be constituted, but the submission of international administrative contestations to an arbitral court will not be considered as a violation of the absolute sovereignty of a State. The observer of the phenomena of international social life may repeat the well-known "*eppur si muove*!" of GALILEI, but the movement is infinitely slower than that of our small planet.

Second Section.

THE SOURCES OF INTERNATIONAL LAW.

§ 8. *National and International Sources of International Law.*

Are there national sources of international law? I suppose that learned jurists, according to whose opinion the relations of international law are exclusively relations between States, will consider the question asked in the rubric as a heresy. A consequence of their opinion must necessarily be, that the only sources of international rules are agreements between States, so either customs of States in their intercourse with each other, or collective regulations made by States. According to the principles on which the present system is based, things are quite different. International law is the body of public and private law, considered from the point of view of a juridical community larger than a State. Not the nature of the authority that enacts the rule,

but the sphere of social life with regard to which a rule is framed, is decisive for the qualification of a rule as a national or an international one. Therefore national customs as well as national laws are sources of international law, in so far as they are intended to govern a sphere of social life larger than a State. We shall find, in the system, if not many customs of this kind, at least many and many national laws, enacted with such a broad view.

The sources of positive rules of international law. If we only consider positive rules, there are, apart from the subsidiary force of the reasonable principles, two sources of such rules: *unwritten law or customs*, and *written law or ordinances*. I beg to remind that the positive unwritten and written laws, even when they are in absolute conflict with the reasonable principles, are binding rules, and that in such a case the said principles are only the touchstone of the righteousness of positive rules and the aim of a present or future evolution. But such a conflict does not always exist, and, when it does not, the reasonable principles have an influence on the practice, which, although limited and modest, is not to be negelcted. In order to understand this influence, it is absolutely necessary to separate the international law, based on reasonable principles, radically from the law of war, a law the nature of which is purely positive as it is by no means founded on reasonable principles.

The limited and modest influence of the reasonable principles. Apart from their value as auxiliaries for the construction of equivocal positive rules, the reasonable principles are valuable as *subsidiary* rules. When in a matter of international law, not belonging to the law of war, there is neither custom nor written law, the reasonable principles are binding, in the name of REASON. I hope to show that they are also of value, *when the real existence of a custom must be ascertained*, and that, moreover, in so far as a custom is in accordance with the reasonable principles, this custom acquires the higher authority attached to an *international-common rule*.

§ 9. *Unwritten Law or Custom.*

Custom as a source of juridical rules. Custom is an old and most

noble source of binding social rules. It belongs to the science of jurisprudence as a common good of mankind. Custom is composed of two elements, a material one, the series of concording acts, and an intellectual one, the conviction that the acts are in conformity with the requirements of the reasonable order of social life. The acts, constituting the material element, are always acts of men, beings with muscles and brains; the acting men may be officials or private individuals. The custom may be a national one, existing only in a special country, or an international one, which several countries have in common. It is both a source of public international law and of private international law.

The acts of private individuals as a source of international law. Acts of officials, bearers of the public power of States, may undoubtedly be the source of an international custom. But, to a certain extent, acts of private individuals may have the same effect. The international customs of trade are binding as well as national usages. The ancient law of the bills of exchange was a customary law. The maritime law has resulted from the customs of the sea.

Local customs and general or universal customs. Local customs are the only ones that require a short discussion. In so far as custom may have a positive force in a State, this custom may concern international relations of a juridical nature, and therefore it is, in such a case, a part of international law. Such a local custom, relating to international life, may e. g. concern the status and the capacity of aliens in a State.

Custom is a source of public international law as well as of private international law. There is no doubt about public international law. Even the law of war is partly a customary one. Private international law has a customary origin; the ancient text-writers very often speak about a *praxis universalis.*

How is the existence of a custom to be ascertained in international social life? This is not at all an easy task. The difficulties exist as well with regard to the material element as with regard to the intellectual one. They are particularly arduous when the acts of officials, the representatives of States in public international relations,

are involved in the question. Is it absolutely necessary that the series of acts is not interrupted, and that there is a clear evidence of the conviction of the acting men or bodies? This matter has often been disputed. An appeal has been made to the opinions of the illustrious scientists and to the resolutions of the international scientific associations, which express the firm convictions of the civilized world. The assertion has even been made that a distinction ought to be made between "leading" nations, the acts and convictions of which should have a far greater weight than the acts and convictions of the not "leading" nations, an assertion the value of which is only that of a *"quia nominor leo!"* It has also been said, in order to conceal the difficulty, that there is no general principle, and that the solution, in every special case, depends on the circumstances. Another time, we find a *horror vacui*, disclosing a *vacuum*, without filling it up. My opinion is that the question is as insoluble without an appeal to the reasonable principles as it is easily soluble with such an appeal. If the acts, from the series of which the existence of a custom is to be deduced, are in conformity with the reasonable principles, a few exceptions, interrupting the series, will not be an impediment, and the conviction of the acting men is to be admitted as soon as there is no evidence to the contrary. If the acts, on the contrary, are in opposition with the principles — or if the pretended custom is relating to a domain where there are no reasonable principles, as, for instance, the domain of the law of war — the series must be uninterrupted and each of the acts must bear the impression of a conviction.

International-common law. This law is the system of the universal customs, formed in conformity with the reasonable principles. It is composed of common notions and of common rules. The common notions are those without which no jurisprudence, as a common good of mankind, could exist, for instance the notion of THE LAW, and the notions of the juridical subjects, the juridical relations and the juridical acts. The common rules are the rules, based on the principles, and corroborated by the practice, a practice which must make evident that the principles have penetrated into the conscience of mankind. International-common law is a positive law. Its signification is, in

contradistinction with purily established custom, that the rules of international-common law are *fit to be extended by interpretation, as far as the reasonable principles reach.* There are many international-common rules, for instance the rule *"pacta sunt servanda"* in the international law of contracts, or the rule that any antisocial imputable act, prejudicial to afellow-man, is the origin of an obligation tending to reparation, such a rule being the basis of the law of torts. Such rules are of the greatest importance in the international law of obligations. If one were to say that this international-common law is nothing else than the Roman *jus gentium*: *"quod naturalis ratio apud omnes gentes constituit"*, I should answer that the assertion is exact as far as the words are similar, but I should frankly add that the *jus gentium* of the ancient Romans was no more than a scholastic parade-law, as it clearly appears from the definition of slavery: *"constitutio juris gentium qua quis alieno dominio contra naturam subjicitur."* The *naturalis ratio* is put aside here, as it can never be *contra naturam.*

The evolution of customary international law. Its evolution will probably be the same as that of national customs. Mankind will try to give more strictness to the customary rules by means of consolidating statutes. But customary law, with its deep roots in the human heart, may be considered as indestructible, both in its conservative power with regard to reasonable rules, and in its progressive power with regard to antiquated ones.

§ 10. *Written Law.*

National laws. I have already pointed out, in § 8, that national laws may be sources of international rules. I shall only mention the fiscal laws here, and the sections of many laws or codes, relating to the so-called conflicts of laws. Moreover, the mention of the national laws, in the present paragraph, is only an introduction. It is my intention to discuss in short the hypothetical international statute-law and its effective substitutes.

The international statute-law and its substitutes. Mankind is entitled to the law-making power, with regard to the entire human

species, and this power may be exercised by the highest representative of mankind, the collectivity of the States. Such an international statute would, in theory at least, stand, to national laws, in the same relation as national laws stand to provincial or municipal ordinances in national public law. But the mould, in which such an international statute could be cast, does not exist in our days. Consequently, the States, desirous to give a field of action, embracing a group of men larger than the population of a State, to a written law, are obliged to make use of the substitutes (or surrogates) of an international statute, viz. *uniform national laws* and *law-making treaties*. I shall have to give the two mentioned substitutes that place in the system which they deserve, but, as I have frequently discussed the matter in my former work, I only do it briefly here.

The first substitute: uniform national laws. It is obvious that when national laws, relating to subject-matters of fiscal, administrative, criminal or commercial law, are enacted in several States in identical terms, the result, which would come from an international statute-law of the same tenor, will nearly be obtained. There are examples of this in federative unions; the American laws on negotiable instruments have been enacted in this way. The Scandinavian laws on bills of exchange and on merchant shipping bear the same character. Commercial and maritime law could be to a great extent equalized in this way. The result could be very much like a universal commercial code.

The second substitute: law-making treaties. The development of the subject-matter is not so easy as that of the preceding rubric; but the literature on this subject is very clever and extensive. Strictly speaking, treaties are covenants between States as public powers; they are not a mould for common legislative measures, enacted by the collectivity of States in order to work as international statutes, which are binding for private individuals in the Courts of law. However, a very general practice in our days has made use of treaties as substitutes of international statutes. Many able works have been published, in my mother-country and abroad, on the form, the ratification, the beginning and the end of the effect of treaties, and I beg to refer as far as these points are concerned, to the literature. Very clever treatises have been publis-

hed, in my mother-country, by the late Prof. T. M. C. ASSER and the late Dr. DE MAREZ OYENS, by Dr. J. A. LEVY and by Prof. VAN EYSINGA. I must add, that my present work has nothing to do with political or martial treaties; so I shall only mention the proviso: *"rebus sic stantibus"* in passing. After having thus laid aside many questions, I meet with other thorny matters on my way, which immediately refer to the peculiar subject of the present rubric. These are questions which I cannot pass over in silence. The first question is that of the foundation of the *binding effect of treaties for the States*. But in our system, the basis of which is the existence of a juridical community of mankind, the binding power of a covenant between States, for the States that have concluded it, is an imperious requirement of the reasonable order of social life. Besides, we have admitted the rule: *"pacta sunt servanda"* as an international-common rule. The second question is more arduous viz. that of the *direct binding power of treaties between States for private-individuals* and for law Courts, which may have to decide law-suits between private individuals. According to the principles on which this system is founded, the answer must be that, if the States intend to bring in force a real law-making treaty, such a treaty is binding for individuals and Courts. The law-making power, in the community of the human species, belongs to mankind, the powers of which are exercised in common by the States. Therefore, if the States intend to give the effect of an international ordinance to a treaty, they are reasonably entitled to do so, and, in such a case, the question of the form of the regulation does not impair its effect. The question may however arise if such an effect is not in contradiction with the *positive national public law* of a country, and such a question must be put aside, as the Courts of such a country will, in every case, apply their national law. There is still a third question, not less arduous if not more so than the second. viz. the question of *the juridical link between a law-making international treaty and the national statutes, anterior or posterior to the treaty*, and regulating the same subject-matter in a divergent manner. An effective international ordinance would overrule existing national statutes, and deprive later national statutes, which are contrary to the rule of a higher law-making power, of their force. But as a law-making treaty

is not an effective ordinance of a higher law-making power, but only a substitute or surrogate, the construction of positive national public law may exclude the binding power of a treaty, especially when a posterior national statute is concerned.

A parallel between the two substitutes. It has already been emphasized that both substitutes are.... substitutes, imperfect surrogates. They have good qualities and bad ones, but these qualities are different. Uniform national laws are effective laws, according to the public law of the State which enacts them. They are undoubtedly binding for the national sphere of social life, and will be applied by the national Courts. Their contents may be restricted to the main points. Particularities may, in case of need, remain divergent in accordance with the local circumstances. The arduous questions of the foregoing rubric do not arise as to uniform laws. The national law-making power will remain free in the future. But the State, enacting a uniform law after a pattern, elaborated in a conference, has not the certainty that other States will act in the same way, or will maintain the uniformity. A treaty, on the contrary, is binding for the States. A treaty, moreover, forms an opportunity for negotiations which may lead to arrangements. After all, the choice between the two substitutes must be made according to circumstances.

The evolution of the two substitutes. Two things must be noticed; in the first place, the possibility of a combination of the two forms, and, in the second place, the progressive improvement of their application. In the Hague international conferences of 1910 and 1912, a very interesting attempt of a combination was made for the unification of the law relating to bills of exchange and checks. The States are bound, by the draft treaty of the Hague, to enact, or at least to submit to the Parliaments, national laws framed in accordance with a type or pattern annexed to the treaty, but only with a certain number of provisos as to less or more important peculiarities. With regard to the improvement of the application, mankind seems not yet ripe for a world's parliament. But, in international conferences of official delegates, we see the application of the good parliamentary conventions and usages more and more, especially as to the thorough preparation of the work and the

soundness of the exchange of thoughts. I am aware of the fact that there is a great difference between a conference of delegates and a parliament, and that in a conference the decision of a majority is not a final one. But great trees are often growing out of small seeds.

Third Section.

GOODS DESTINED, ALTHOUGH ONLY IN GENERAL, FOR THE COMMON USE OF MANKIND.

§ 11. *The Earth.*

The principle. The high administration of the earth, in so far as it is destined for the common use of the human species, belongs to mankind. It is clear that we only have to do with an *imperium* and not with a *dominium*. According to the principle, mankind and the collectivety of the States, as its representative, are entitled to a paramount power, with regard to the entire planet. But, as will often be seen in matters of administrative law, the interests of mankind and those of a State, as to its territory, are so concordant, that the juridical limits of the sovereignty of the State are scarcely to be noticed in this case, and that, in reality, the power of the State on its territory is almost absolute. The desirability of an evolution is therefore almost imperceptible.

The positive law. The power of the State, which in principle is *almost* absolute, is *entirely* absolute in the positive law. As we have seen, the territority of a State is one of the common treasures of its citizens, and the possession of such a treasure is one of the elements of patriotism, considered as a pleasant sensation. Such a sensation is in reality entirely compatible with the paramount power of mankind, the infringement of which on the sovereignty of the State is extremely small, but as feelings are independent of logic, national feeling is often hurt as soon as the thought is expressed that, on a territory, there is to be a human power which is higher in social rank than the fatherland. My countryman JOHN VOET, in his commentaries on the Roman law, has said that a State maintains *mordicus* its territorial rights. But if

we ask, as impartial observers of life, what is the practical difference between the limited but almost absolute sovereignty, granted to the State by the principle, and the unlimited entirely absolute sovereignty of the positive law in this case, we shall find that the difference is extremely small. The State, according to the principle, is entitled to regulate the private property of definite immovable goods; it may, without any infringement upon the paramount right of mankind, restrict the *jus abutendi* of the owner, and even issue prescriptions relating tothe *modus utendi*. The State is entitled to lay down the rules concerning the transmission of a definite immovable good and the acquisition of *jura in re* on such a good. The situation of an immovable good is a criterium of reasonable jurisdiction. The State has the high supervision on roads, railways, etc. It is entitled to regulate the exploitation of mines, etc. It has the right of dispossessing the owner in the interest of the social community. If the State would consider the so-called nationalization of the soil as a domineering interest of the national community, the execution of such a radical measure would not encroach upon the paramount power of mankind. There are however juridical limits to the territorial sovereignty. The State has de facto the power to close its frontiers and to forbid the international circulation of goods and persons; such would not only be an infringement on an international common rule, but also an unreasonable act, even a folly. Without closing its frontiers, the State has de facto the power to exclude aliens from the ownership of the soil or to deny them the right of acquiring real estates by succession. The positive law is sometimes not disinclined to do so, but the measures of reaction or retortion taken by other States show that they consider it an abuse. We shall see also, in the part of the system devoted to private international law, that often, in positive law and in its practice, the rule that immovable goods are governed by the law of the country, in which they are lying, is often applied too rigorously. I intend to revert to this subject.

Can an evolution be expected? Up to the present time, there has scarcely been any inducement to an evolution. The conveyance of passengers or the carriage of goods, on international railways, or the international circulation of motor-cars might have been such an indu-

cement, but the interest of the States in these matters are so concordant, that the necessity of an intervention of a central power, exercised by mankind itself, is scarcely conceivable. An enormous power of imagination is wanted to conceive a situation, in which a railway of universal interest, or a tunnel in such a railway, or panplanetarian irrigation-canals after the pattern of those, disclosed by the telescope of the Rocky-mountains on our sister-planet Mars, would necessitate a compulsory intervention of mankind, acting against the will of a State. It must be emphasized too that the problem of the nationalization of the soil will remain a national problem for a very long time. A "humanization" is not absolutely unimaginable, but it is no more than that.

§ 12. *The waters.*

The liquid surface of the globe. It is evident that this surface is not politically divided in the same way as the solid superficies. It is for the greatest part God's waterway, destined for the common use of mankind. As to the high seas, the rule of freedom of the seas, in time of peace, is confirmed by the international common law. The same thing cannot be said of all the other waters, which, in positive law and in practice, cause many divisions and distinctions. It is my intention to condense the whole subject matter in two rubrics or subdivisions, the first of which will be devoted to the high seas and the second to what I take the liberty to call: the other waters. But before embarking on a short voyage, I have a few observations to make. In the treatises relating to international law or to the so-called law of nations, which also includes the law of war, we find many and many chapters on waters, and, as I dislike to repeat the things that have been said in earlier works, my observations will be so much the more succint as those of my predecessors are circumstantial. The second observation is that I am aware of the fact that the high seas are a most remarkable "theatre" for the war, but as the law of war is not a part of a system of international law, founded on reasonable principles, I need not discuss it here. It will be easy to understand how greatly the two previous observations simplify my task.

The law of the high seas. Mankind is entitled, here, according to the principles, to a paramount law-making and administrative power. The collectivity of the States may exercise these powers, as far as it may be suitable. But a regular and circumstantial exercise of these powers, by mankind itself, is not desirable. The interests of the State and those of mankind are closely connected here, and mankind, acting reasonably, has only to maintain a supreme right of supervision. Each State exercises an authority on its merchant-fleet and on its fishing-fleet, which — *mutatis mutandis* — is similar to the authority which it possesses on its own territory, i. e. an almost unlimited sovereignty. No fiction purporting that ships are a floating part of the territory is necessary to come to the said conclusion. The power of the State is in accordance with reasonable principles, confirmed by the customary law. In the positive laws, the States, being unlimited sovereigns, have regulated the conditions under which a ship may sail under the national flag. The conditions are not the same everywhere, and, even in time of peace, practical difficulties may arise from these divergencies. In theory, it seems easy to equalize the regulations relating to the flag, and even to co-ordinate or to centralize the registration of merchant ships .In practice the matter is thorny, in the first place because some nations wish to grant privileges to their national flag, and, in the second place, because the law of war has created the notion of the hostile ships. Nevertheless there are many other points, with regard to which the idea of international administrative regulations has found its way into practice. I beg to call the attention to the matter of the collisions at sea. It is obvious that the reasonable principles do not require a merchant ship to bear a green light at her starboardside and a red light at her portside, but if each State were to regulate the colour and the place of the lights with unlimited sovereignty, and without any regard for the uniformity, the regulation would be a danger instead of a measure of precaution. I also call the attention to the international agreements relating to the civil consequences of a collision, to the maritime salvage, the obligatory life-boats etc. on board a ship, the survey of the icefields, the maintenance of some light-houses etc. The protection of submarine-cables must be co-ordinated. If after THE WAR submarine-ships will become

regular means of communication, special adequate regulations will be unavoidable. The bottom of the sea, rather a *res communis* than a *res nullius*, may be freely utilized; a State may even, as far as it is possible without disadvantage for the community of mankind, acquire a right of temporary possession on some parts of the bottom, by means of cables, tunnels or passages belonging to mines. If difficulties were to arise — which is not very probable — the collectivity of the States might have to intervene. If the bottom of the sea could be utilized, in future times, by means of rails or even roads, carrying watertight trains or motor-cars, collective regulations would be necessary. But I fear that I am going too far.

The other aquatic surfaces. I shall not enter into the manifold distinctions to be found in the treatises on the matter, and I shall only show in how far the principles and the positive law may be opposed to one another. According to the principles, the State has, with relation to the waters belonging to its realm or connected with it, the duty, towards mankind, to insure the free and orderly use of the waters as means of communication as far as its power de facto allows, and, therefore, the State is exercising the sovereign rights, correlative to its duty, on these waters. Hence, the State exercises the policy of navigation, the sanitary survey and the survey connected with the custom-house duties. The State is also entitled, within reasonable limits, to the administrative, criminal and civil jurisdiction. The positive law, with its manifold distinctions between the maritime belt, straits, gulfs, lakes, rivers, canals, etc. has considered the same questions, not from the point of view of duties correlative to rights, but from the point of view of an absolute sovereignty, exceptionally admitting some limits. The positive law is inclined, for instance, to admit, as a sequel of the absolute sovereignty, that the State is entitled to exclude foreign ships from the coast navigation and from fishing in the maritime belt. But, although a certain opposition may be ascertained, the matter contains the germs of an evolution, which is leading to the free utilization of the waters, under supervision of the local authorities, not only in straits and rivers, but also in interoceanic canals.

§ 13. *The Atmosphere.*

What may be the reasonable principle here? The old question of the elevation of buildings — the tower of Babel was only international in a special sense — and of the bending of electric wires, which are high enough above the ground to be harmless, are trifles in comparison with the question of the aerial navigation. Only since THE WAR this last question has left the domain of sport and has entered the broad field of practical application. During THE WAR the application was a thorough practical school, it has left mankind the master of the atmosphere. The old struggle for the freedom of the high seas has not extended itself to the aerial space above the high seas, and a new struggle for the freedom of this space will probably not arise. Free circulation in the said space, a common *highway* in the literal sense of the word, will at least require co-ordinated national measures, if not collective international ones. Most probably the airships will be provided with a flag or another national distinction, and every State will enact regulations of an administrative or even civil nature for its national airships. Such regulations will most likely not be absolutely identical, but some regulations as to night-signals or the etiquette of the road in horizontal or vertical direction must be equalized; conflicts of law, here, would be a peril of life to passengers and crews. The laws will necessarily have to be uniform. The question of a reasonable principle will only be a matter of discussion with regard to the space, which I take the liberty to call the rest of the atmosphere, especially with regard to the "territorial space", the air above the solid territory of the State. According to my opinion the reasonable principle is the same here as for the sovereignty of the State in general, which sovereignty is only existing for the sake of the law. The State has duties to fulfil with regard to its "territorial" air-space, and is entitled to the rights correlative to its duties. It would be an abuse of its de facto power, if the State would attempt to close the "national" air-space. The reasonable power of the State is only limited, in a vertical sense, by its de facto power on airships, circulating under or above the clouds. The positive law, however, will sooner consider absolute sovereign

rights than duties of the States. Martial and fiscal considerations will, at least in the first times, have more influence than the duties towards mankind.

The beginning of a uniform atmospheric law and its future evolution. As to the beginning, I refer to the foregoing rubric. But the States will very soon understand that the requirement of uniform regulations does not only exist with regard to the free space above the free seas, but also with regard to the air-spaces generally. The period of a customary development of the law will most likely be passed over. Codifications will be attempted immediately, and the regulations will be gradually revised according to a greater experience. In the first times we may expect that egoistical considerations, the fear for espionage or smuggling for instance, will domineer, but as the whole matter is new and without any historical roots, we may hope that the end of the evolution will be an equalization of the national regulations, in the spirit of the reasonable principle.

Fourth Section.

TAXATION.

§ 14. *General Views as to international fiscal Law.*

The question as it ought to be put. I am not thinking of a common treasury of the nations. In some treaties, relating to unions of States founded with a special design, we find stipulations, purporting that some expenses, for instance those of a central office, are to be paid by the contracting States in a fixed proportion, but such a regulation is scarcely to be considered as the germ of a world's exchequer. In the customary or written international law, there are also regulations with regard to privileges of so-called exterritorial persons as to the local taxes, but it is sufficient to mention these regulations, and to refer to the literature. International fiscal law, which will be discussed in this section, has quite a different nature. In order to understand the real signification of this part of international law, it is necessary to remember that relations of international law are not exclusively relations between States as public powers. The treasury of a State

may enter into relations with that of another State. Such relations are certainly not without significance, but, in the practice of international fiscal law, the most important relations are those between the treasury of a State and the individuals, the social life of which extends itself over more than one State. The international fiscal law, finally, is the fiscal law, considered from the point of view of a juridical community larger than a State.

Reasonable principles. The principle of taxation is perfectly reasonable. The State, the local sovereign as the representative of mankind, is entitled to raise the taxes, which are necessary to enable it to fulfil its task. But this right of the State is neither absolute nor unlimited, it has juridical limits deriving, as has been exposed in § 2, from the duties of the State, not only towards other States but also towards the members of the human species as individuals, who, to a certain extent, are sovereigns in the realm of their own personality. The State has to reckon with the rights of individuals, whether they are its subjects or not. According to the principles, the burden of the taxes, imposed on individuals, may not be so heavy that the individuals are precluded from living in reasonable economic conditions. Besides, the State must pay attention to the conditions of the economical life of mankind, and therefore recognize the other States, as local representatives of mankind, fulfilling social duties similar to its own duties, and entitled to raise taxes on a reasonably limited field. Hence, the State has to avoid, as far as possible, double or multiple taxations, which are detrimental tot he sound economical conditions of the individuals as well as to those of other States. It must be emphasized that, according to the principles, the right of taxation of a State has its limits. In the further development of this section, we shall see also that the nationality of individuals — or corporations — their domicile, the situation of a good or the seat of an industrial or commercial undertaking, are by no means elements to be taken into account for the solution of "conflicts" between fiscal laws, but simply points of contact between an individual and the treasury of a State.

The national treasury in positive laws. The positive laws theoretically bestow on the State an absolute right to raise taxes,

without any other limit but that of the length of its arm. Undoubtedly the treasury has to abstain from taxing persons who are not within the reach of its arm. There are also judicious rules, well-known proverbs, which every treasury will follow under the influence of its common sense, the rule, for instance, that the hen laying golden eggs ought not to be killed. But as to juridical limitations, the treasuries pretend to be deaf. It is of use, however, to lay the positive law on the touchstone of the reasonable principles and to investigate if there may be germs of an evolution.

Are there any germs of an evolution? They are to be found, but they are very, very small. Sometimes a State considers the fact that a thing, effectively taxable by its own treasury, is also taxable for another State, and that a double taxation would be prejudicial to international social life. This question of a double taxation attracts the attention more and more. The *Institute of International Law* has been occupied itself with it, and I beg to refer to the XVI th volume of its Yearbook, pp. 118 sqq. We must be well aware of the fact that an evolution, in the domain of taxation, meets with formidable impediments. One of these impediments is the extension of the general expenses of the State. I must say quite frankly that these expenses are not always justified. A second impediment is the greater intervention of the State in the so-called social question. A third impediment, finally, is the desire to increase the national wealth by means of protective duties.

Matters to be submitted to a further investigation. The field of the international fiscal law is very extensive. The number of taxes is legio, the leaders of fiscal systems being exceedingly ingenious. A well-known division of the taxes is the division into direct and indirect taxes, but the line of demarcation is not always traced in the same way. I do not intend to take it as a basis for dividing the matter. In the following paragraphs, I have briefly discussed some categories of taxes, which I consider useful with regard to the aim of my work. I hope to set the reader thinking, and that will be enough for me.

§ 15. *Wealth, Income, and the specific Elements of both.*

Preliminary remarks. Every man, living in a political commu-

nity, is reasonably obliged to contribute to the public expenses according to his capacity, wealth and income, and although income does not exactly coincide with wealth, as may be considered well known, the total income of a man is, after all, a rough but rather accurate measure of his taxpaying capacity. If the expenses of the State would be reduced to the strictly necessary ones, if for instance the expenses connected with the state of being prepared to carry on a war could be minimized, an income-tax, which would take into account the varieties of the sources of the income, could be, if not the only tax, at least the chief-tax. But such a fiscal system would not only require an inquisitorial supervision, but at the present time it would also accentuate too clearly that the expenses of the State are unjustified or exaggerated, and then the burden would be too heavy and too odious. Hence, the ingenious treasurers of the States have invented other taxes, destined to take the place of a general income-tax or to be added to it. Taxes which are taking the place of a general direct income tax, are those that calculate the total income of a man after external marks, as e. g. the habitation, doors, windows, fireplaces, male and female servants, horses, carriages or motor-cars, yachts, etc. A taxation of the real income is then unnecessary. Sometimes however a direct income-tax based on evaluation and a tax on the income inferred by means of external marks, are both raised. The direct income tax, in this way, is apparently moderate. The same result may be attained by other taxes raised together with the direct income-tax on special parts of the riches or on elements of the income. These special parts of the riches are the immovable goods, which are easily visible, and the effective or inferred revenues of professions. When the revenues of a company's profession are the basis of a tax, and the direct income of the share-holders is taxed also, the same element of the income is taxed twice. The foregoing remarks will be sufficient to justify the combination of several kinds of taxes as mentioned in the present §. Sometimes the individual has to pay not only on the basis of his directly evaluated income, but also on that of his external signs of wealth, and sometimes, besides, also on the basis of special elements of his riches or of his income. In my mother tongue

one would say that the great number of the trees prevents us from seeing the forest.

Is a reasonable principle to be established? In the first place we can see here the exact manner to put the question. The question is not which are the relations between the exchequer of State A and that of State B; we only have to do with a fiscal relation between an individual and the treasury of a State. This treasury may have to deal with subjects of the State having their chief-settlement abroad, or, if they are domiciled in their mother-country, owning goods situated abroad, or earning a part of their income by a business carried on in another country. The same thing may be the case with regard to aliens, domiciled in the country. It is also possible that individuals, not being residents, are earning money in possessions or undertakings in the country. It is for the various cases mentioned above that we must find a reasonable principle. I think that such a principle can be established and my intention is to trace some delineations, without pretending that my conclusion is the only reasonable one. In the first place, I beg to say that the only individual who may be taxed in a country on the basis of his total income, is the individual *whose domicile is in that country*. In the second place my thesis is, that a man who, without being domiciled in a country, draws an income from a source existing in that country, is liable to pay taxes, with regard to this source, in an *equitable proportion to the degree of his penetration into the local social life*. The consequence of the combination of the two foregoing theses is that if the State, that is entitled to tax the person on the basis of his total income, is desirous to fulfil its duty towards the person and to enable him to live in reasonable economic conditions, it is bound to deduct, not exactly the full amount of the tax raised abroad, but a reasonable part of the said foreign tax. The practical applications of the principle may certainly create difficulties. The place of the domicile may be disputable, and the same thing may be the case with the situation of a good or of a source of income. As far as contradictory administrative decisions may have been pronounced in various countries, in which the reasonable principle is admitted, an appeal to an international administrative court ought to be organized.

The positive fiscal law and its evolution. The positive law admits the two primary theses laid down in the foregoing rubric, but it does not at all admit the conclusion deduced from their combination. Domiciliated persons are taxed generally on the basis of their total income, and not domiciliated persons or companies, owning possessions in a country or even drawing an income from local undertakings, are taxed very accurately in proportion of the value or the amount of the possessions or earnings, but as to a deduction, the treasuries, at least with regard to foreign countries, are, as a rule, deaf. Exceptions confirm the rule. The individual, who is taxed abusively, can only try to find a remedy by means of complaints directed to local fiscal authorities of either of the countries concerned. No appeal to an international court is admitted. The germs of an evolution are to be found in provincial, colonial, federative or quasi-federative regulations or agreements, framed with the intention of avoiding double or multiple taxations. It is clear, finally, that THE WAR and its fiscal consequences will not promote the evolution.

§ 16. *Excises, Import and Export Duties on Commodities.*

Their international side. This is the only side to be discussed here, and I again take the liberty to concentrate my investigations, this time on the *protective duties*. It is, in a certain sense, a splendid field for a study of the phenomena of international social life.

Protective duties, according to the reasonable principles. If the State, the local representative of mankind, has the duty to abstain from being prejudicial to the community of mankind, protective duties, raised with local selfishness, are a violation of its duty towards mankind and an ill-use made of its factical power. The free circulation of commodities is one of the conditions for a sound economic intercourse, from the point of view of mankind. The system of protection, moreover, brings colonial expansion with the aim of an oppressive colonial management, and economic and martial wars, based on unsound international competition, along with it.

Protectionism in the positive laws. In the positive laws, protective

duties are not considered contrary to any reasonable principle of law; the title of the State is scarcely considered a subject of discussion. The supporters of the protective system and those of the free trade are at war with each other, but the aim of the struggle is not so much to settle a question of law as one of opportunity. Both conflicting parties like to call one another "names". The supporters of protectionism are quite unwilling to consider the State as a representative of the public power of mankind, they try to oppose patriotism to cosmopolitism, and to spread the opinion that the quality of being a cosmopolitan is equivalent to that of being a traitor. The free-trade men analyse the soundness of the patriotism of the protectionists; they maintain that the patriotic canticle in only a disguise of the anti-national selfishness of producers. Apart from the "names", I think the reader will be fully acquainted with the arguments of both parties. For the sake of the present work it is sufficient to emphasize the opportunistic argument, which is often heard. If the great majority of the States were to admit the free-trade principle, the opportunist says, and this saying is in reality a latent homage to the reasonable principles, one would follow readily, but it would be a folly to be a free-trader between protectionistic neighbours. Sometimes an opportunistic argument is deduced from the local conditions of labour: if our conditions are good and those of our neighbour are bad, our producers are unable to compete without "protection". According to the opportunist it would finally be the apex of simplicity to preclude ourselves from the opportunity of concluding so-called commercial treaties with our protectionistic competitors. The foregoing considerations will in any case show clearly how powerful the impediments of the evolution are in this matter. The "names", given to each other by the parties in the struggle, are only an evidence of the fact that they do not admit a common principle. I shall not discuss the peculiar duties on commodities, the excises, monopolies, etc., and beg to refer to the literature.

Progress or regression? I feel obliged to put this question. The impediments of an evolution are so formidable that the eventuality of a capitulation of the free-trade system must be taken into consideration. Such a regression is possible under the economic influence of

THE WAR. Many States have been obliged, by the events, to produce things, which had always been imported before. If the young production, a forced plant, needs the hot-house of protection, will it be possible to deny it? It will be a provisional protection, but provisional measures are often of a robust frame. The exhaustion of the treasuries will also have something to say in the question. As to future tariff-unions and commercial treaties, I am not able to make any prophecy.

§ 17. *Wealth, appearing irregularly.*

Preliminary remark. I carefully follow my method of concenstration, and I shall confine my investigations to two taxes. The first is the succession, estate or legacy duty. I shall neglect the variegations, to which a monography would have to call the attention, and I shall only speak about *succession duty*. The second matter of investigation is the *stamp duty*. I shall confine my inquiry to the bills of exchange stamp, in which the international side of the matter appears at first sight.

Succession duty. The matter will show its international side very often. This side has been investigated in monographies. The successors or heirs are very often obliged to pay duties in more than one State. In general, I beg to refer to § 14. The succession duty, however, in contradistinction with the income tax, depends, in the philosophy of law, on the construction of the right of the heirs and successors, and a duty, based on the situation of the goods, would be more justified with regard to the succession duty than with regard to the income-tax. The nationality of the deceased could also be taken as a general basis for the succession duty. The consideration of § 14 holds good with regard to the reasonable principles. The positive law of the various States has established the succession-duty as well on the basis of the domicile of the deceased as on the basis of the situation of the goods, so that the heirs or successors will often have to pay the duty for the entire estate in the country where the deceased has had his domicile, and also to pay, in the other States where the deceased had possessions, a duty on the basis of the value of the said possessions. The place where the deceased had his last domicile may be questionable, and the same thing may be the case with regard to the situation of some of the goods.

A negative competency-conflict between fiscal laws may exist, when all the connected treasuries deny that the domicile of the deceased was in their own country, and are therefore of opinion that they are not entitled to raise a duty on the basis of the entire estate. The successors who are no supermen, do not utter any complaints, but a double taxation will occur oftener than no taxation at all. The fact is that, with regard to a double taxation, even on the basis of the entire estate, the injustice is not so obvious as in the case of a double annual income-tax. The fiscal officials have no pity with the heirs or legatees, who are obliged to pay certain duties more than once, and therefore a regulation of the matter by means of an international agreement must not be expected very soon. With regard to provincial and colonial taxes, or to a double taxation in States, belonging to the same federation, an evolution is visible, and, in the long run, the movement may really become an international one.

The stamp-duty on bills of exchange. According to the principles, a proportional duty, based on the sum to be paid, should only be levied once for an international — or so-called foreign — bill, either in the State where the bill is drawn, or in the State where it is payable. A double proportional taxation is detrimental to the sound development of international trade. Some of the States, desirous to promote the international commercial relations, have acted in the spirit of the reasonable principle. They have limited the proportional duty to the bills payable on their territory and they only submit the bills, drawn in their territory and payable abroad, to a small fixed stamp. Other States, apprehensive of an evasion of the duty, raise a proportional duty in both cases. In the Hague conferences for the unification of the laws relating to bills of exhange, attention has been paid to the bill stamp, but the question of a double proportional taxation was not discussed. I wish to observe, moreover, that with regard to cheques, the stamp question is still more important than with regard to bills and promissory notes.

§ 18. *Rewards for administrative Services.*

General remarks. In many cases, the States exact a remuneration

for a service which bears a public character. The remuneration may be inferior to the value of the service, on social grounds; it may be equal or superior to it, on fiscal grounds. In the cases where the remuneration is not measured according to the value of a service, but is given in proportion to the value of a good or of a thing connected with the service, we have really to do with an ordinary duty, belonging to the category discussed in the previous paragraph. The remuneration may be connected to a service which the citizens have to accept by law. The service may even be monopolized by the State. Strictly speaking, the premium of social assurances could be reckoned to the remunerations for an administrative service, but it seems better to consider social assurances as belonging to the category of the measures taken by a State with the aim of promoting public welfare.

The international side of some remunerations and the principles applying to this side. An international side is not to be found in every public reward, but this side becomes very obvious when the service is rendered by several States, acting collectively or in succession, as is the case in the international postal service. A double remuneration would be prejudical to a sound international intercourse; strictly speaking the reward ought to be divided among the States. A prejudice to the international intercourse would also arise, when a State would oblige the persons to accept, on fiscal grounds only, a quite useless repetition of the service rendered by another State, as would be the case in the matter of the official measurement of ships, and, to a certain extent, in the matter of the so-called "registration" or "official record of deeds". A third form of abuse of the compulsory power *de facto* would be a regulation obliging aliens to pay more than the subjects for a service of quite the same nature, as might be the case with regard to the remuneration-duties laid on merchantmen in ports or canals or on the inventors for the grant of patents. I expect that the previous observations will make clear that, according to the principles, the power of the State, in the question of public rewards, also has its juridical limits.

The positive law and its evolution. The said juridical limits are not recognized by the positive law, but they are aften observed, only

because they are reasonable. It may be that the States are reasonable in their own interest, but then this interest is a factor of the evolution. In the international postal service double remunerations are accurately avoided. As to the official measurement of ships, a useless repetion of the service in foreign ports is prevented by means of international agreements. The same thing ought to be the case as to the so-called "registration" or "official record of deeds", but very often the duties of this kind have so absolutely lost their character of a reward for a service and taken the nature of a regular duty, that the fiscal interests are generally domineering. Very generally, when awards for services are exacted, aliens are equalized to the own subjects of the State. The international treaties, relating to patents or inventions and similar matters, have a tendency in this direction.

Fifth Section.

PUBLIC WELFARE AS A MATTER OF OFFICIAL CARE.

§ 19. *General Views.*

Individuals and Society. The individual, according to the principles, is a sovereign in the sphere of his own personality. He has, within certain limits, to take care of his own welfare. He avails himself of the influence of his relations. He concludes fraternel alliances with his fellowmen for the common benefit of the parties. Social life without individual freedom would not be in harmony with reason. Society, however, has also a sovereignty, based on the philosophically justified power of personified mankind over the human species, a sovereignty which is neither absolute nor unlimited, as it exists exclusively for the sake of the reasonable order of social life, but which, for this sake, domineers the self-government of the individual. A social life, based on anarchy, is just as much in disharmony with the principles as a social life, based on hyperarchy. The contrast between individual and Society is the essential thing in the SOCIAL QUESTION. The world has to find its way between individual freedom and social domination.

The exact point, where Society has to stop out of regard for the individual freedom, is not fixed by a quasi-mathematical rule; the demarcation is a matter of governmental wisdom, enlightened by the political economy, as the philosophy of social life.

States and mankind. The supreme direction of the public affairs of the human species ought to be in the hands of mankind and its representatives, but stress must be laid on the adjective "supreme". Mankind, even if it should be organized, would act unwisely in centralizing the care of public welfare. It would, on the contrary, delegate the greatest part of its power to the political groups of men, in which the *corpus* and the *animus rei publicae* are to be found. These groups, not considering the Continents, are the States. They are nearer to men than mankind may be, they are able to set on work the most powerful springs of human activity, family-love and patriotism, affectionate feelings the effect of which is to render the welfare of the other members of the family and of one's countrymen a cause of personal joy. The general welfare of mankind and the welfare of a national group in mankind are, *in general*, so closely connected, that the supreme direction of mankind, even in its full organization, would *almost* remain a theoretical power of intervention, and the sovereignty of the State would be de facto almost unlimited. In this way the egotism of the State, and even the selfishness of a union of several States, are mighty factors of the progress of mankind. I have made some restrictions, as I have spoken about an "almost" unlimited sovereignty of the State, and it is my intention to show that, although the juridical limits of the sovereignty of the State are not always apparent in our matter, they exist notwithstanding. The egotism of the State may be a psychological factor of the evolution, but it is neither the touchstone of the righteousness of international administrative rules nor the final aim of their evolution.

Some special matters to be discussed. The positive law has in general taken as its basis, if not the selfishness, at least the absolute sovereignty of the State. An opposition between the local interest in a State and the superior interest of mankind, is generally not to be found, but with regard to a few special matters, a real opposition of the said interests

will appear under certain circumstances. That is the reason I have made these special matters the object of the following paragraphs.

§ 20. *Education.*

The State and the education of the youth. Education is the link between the generations of men. Each new generation adds its own experience to that of its fathers, to the benefit of the offspring. Education is a condition for the preservation of the dignity of the social life of mankind. Mankind is therefore entitled to a high supervision of the education, and this is also the justification of the intervention of the State, as the local representative of mankind. But even the supervision of the State is only a high supervision; two reasons induce the State to delegate its power to other groups, especially to the family, to the churches and to the municipalities. The first reason is that the other groups are nearer to the individuals than the State, the second that the education of the young people is not only a matter of cold logic but also of warm sympathy, as the way to the juvenile brain goes through the heart. But we shall have to investigate a few sides of the education, which, to a certain extent, show an opposition between the interest of mankind and some national or special interests.

Patriotic education. I feel convinced that it is by no means a paradox to say that the education, in a State, has to be patriotic *in the interest of mankind*. Cosmopolitism, in the high sense of consciousness of the reasonable conditions of international social life, has nothing to fear from a sound and affectionate patriotism. Patriotism is a feeling, which smoothes the struggle for well-being in the State, in so far as the well-being or even the glory of one's countrymen is a source of personal joy. But in practice the limit is exceeded, when the patriotic education induces the youth to despise or even to hate other nations. Such an endeavour may be intelligible in times of war, and warfaring States will consider it a special interest to impress martial feelings in juvenile hearts, but the interests of the State and those of mankind are then in opposition, and the way of the evolution is blocked up by a powerful impediment.

The language. It is scarcely necessary to say that the vehicle of education, on the way through the juvenile heart, is the mother-language. It is a most valuable inheritance of our ancestors. The glory of the national authors is a source of personal pride and of noble emulation. But a first thing to be noticed is that the boundaries of the language-community and those of the State do not always coincide. A language may be common to several States, and in such a case the larger community is eminently useful to the evolution of international law. It may also be the case that more than one language is spoken in a State. Such a fact is not necessarily an obstacle to a sound patriotism. The population may have a common political ideal and in such a case sound patriotism, not incompatible with some particularism, will easily overcome the obstacle, provided that the State does not exceed the limits of its sovereignty with regard to individuals, and does not attempt to root up one or more of the languages, by means of a hypnotic education. If this is attempted, it will not only give rise to national disorders but also to international hostilities, if the despised and persecuted language is the language of one or more foreign nations. There are still other international sides to the language-question. Isolation in the domain of language is not a splendid one. The study of foreign languages is an element of a good education. The differences of the languages do not impair the evolution of science, as a common good of mankind, to any important extent, but they are an impediment to the development of a sound commercial cosmopolitism. The attempt might be made to raise one of the living languages to the rank of an international common language of trade, but this would not easily be attained. It is not necessary to explain the cause. Valuable attempts have been made to create a new language, as simple as possible, with rules without exceptions, each vowel and each consonant having but one definite sound. I think the success has been very moderate up to the present time.

History. National history is, even when there is no intention to impress martial feelings in the hearts of the youth, a martial one, and martial education is not entirely in harmony with the interests of mankind. This history, moreover, is interlaced with legends, which are

much finer and more touching than the simple truth. I beg to remind the reader of the discussion of patriotic education. As long as the education will be a martial one, the teachers, whose education has also undergone the influence of magnificent legends, will not easily drop these legends. As an impartial observer of the phenomena of life, I feel obliged to emphasize this.

Religion. In this matter too, I am only an observer. Religious feeling in general, and the dogmas of the positive religions especially, are most importants elements in the education. The questions connected with religious faith and religious morals are of the greatest importance to mankind in general. But, although religion is a cosmopolitan, or at least a supernational phenomenon, the most delicate questions, connected with a religious education and the supervision of the State on the education in general, have not yet exceeded the domain of governmental wisdom in the States. The liberty of conscience can, in peculiar circumstances, create an opposition between national and international interests. Some international treaties have imposed the respectation of this liberty, on newly created States especially. It is my intention to discuss, prudently but frankly, the influence of the supernational religious communities on the war and on the positive law of war, but as I have already pointed out, the latter law does not belong to a system of international law based on reasonable principles, and so I shall return to the matter in an appendix to the system.

The education of foreign residents. This is another international side of the question of education. The State, according to the principles, has also its duties and rights here. It has the supervision of the education of such aliens. Compulsory education does not exceed the reasonable limits of its sovereignty, but a regulation excluding foreign childern from the national schools, on the ground of real or imaginary racial differences, would be against the principles. In the positive law such an exclusion is not entirely unknown, but only as an exceptional and probably temporary thing.

§ 21. *Labour.*

Labour in general, as a matter of official care. The immense

importance of the question is well known. It is one of the main points of social philosophy. It is connected with many other questions, each of which could fill up, with its literature, a division of a juridical library. I shall only mention the denominations of the said divisions, viz: population, education, lodgings, emigration, public health, duties and rights of parents, taxation, social insurance, benevolent and friendly societies etc.. Even the special chapter relating to the conditions of labour can be subdivided into many parts, each of which would also fill up a division of a library. It will be sufficient to enumerate the professional education, the apprenticeship, the individual and collective contracts of employment, the labour of women and children, the reglementation or even prohibition of dangerous industrial proceedings, and last not least, the maximum number of workinghours and the minimum wages. For the sake of the present work the enumeration of the most important denominations will do, because in the main the various questions must in our days be solved by wise national laws. There are however special points which may be considered of international significance. The positive law does not deny this international significance, but the collaboration of the States is considered more as the consequence of a community of harmonizing interests, than as the fulfillment of a juridical duty, which limits the sovereignty. Interest, according to my opinion, is not a juridical basis, but only a psychological moving-spring. There are at least many points, with regard to which the interests of the States are not quite harmonizing.

National labour and protectionism. Nobody will deny the State the right to take measures, purporting to organize national labour in a good way and to promote the well-being of its subjects. But according to the reasonable principles there are juridical limits to this right, which, in the positive laws, are often exceeded. The State has to avoid measures which are prejudicial to mankind. In the positive law abusive measures concerning the admission of emigrants are not taken unfrequently. The State is certainly entitled to a supervision of the emigrants, but conditions, only purporting to exclude the competition of foreign labourers, exceed the limits. The same

thing may be said about absolute exclusions, founded on race or religious confession. It must be observed that such measures, detrimental to black- or yellow-faced fellow-labourers, often meet with enthusiastic popularity on the side of those for whom the exclusion is advantageous. Such enthusiastic feelings are an impediment to an evolution.

International agreements concerning labour. Here we certainly find the germs of an evolution. The State which, in its isolation, has taken measures tending to increase the well-being of the national labourers, at the same time increases generally the expenses of production and the price of the industrial products. The competition of the States, in which no similar measures have been taken, will often become too great. Such situations must give to the States the conviction that only collective or at least co-ordinated measures will be effective, and, in this way, interest and duty are co-inciding. In fact, the treaties of Bern (1906) have framed co-ordinate regulations, concerning female labour and the prohibition of the use of white (yellow) phosphor in certain branches of industry. It is obvious that such measures and other similar regulations which have been projected, have given rise to many able treatises, but for the sake of our work a mention will be sufficient. Treaties have also been concluded, especially between neighbouring States, in order to equalize the labourers, who are subjets of one of the States and residing or labouring in the other, with regard to social insurances.

International associations of labourers and of employers. Ths same current, driving the law-givers to concordant or co-ordinate measures, induces the national unions of labourers and of employers to international fraternity. Such associations exercise a great influence on the movement which has the tendency to equalize or to co-ordinate the national laws. During THE WAR martial patriotism seems to have been stronger than the fraternal feeling towards one's fellow-labourers, but feelings are as unsteady as the clouds in the sky. Both the supernational religious communities and the supernational associations of labourers, struggling for emancipation, are factors to be taken in consideration with regard to the causes of war,

and the subject will be dealt with in the appendix to the present system, which will be devoted to the positive law of war.

Political parties aiming at the radical reformation or even at the destruction of the actual state of Society. They are to be mentioned as supernational associations, which are of influence on the national feelings. Subversive anarchism is also a common danger for the States and may become an inducement to take collective measures of defence or repression.

§ 22. *The principal Branches of human Activity.*

General principles. The principal branches of human activity, agriculture, industry, trade, science and arts, are most essentially branches of individual activity. They belong to the domain of the sovereignty of men on their own personality. But they are also factors of the public welfare and therefore the social powers are entitled, not only to a right of high supervision, but also to administrative measures which may lead to the development of the general prosperity. As the interests of mankind and those of the States generally coincide, the juridical limits of the sovereignty of the States are only apparent in peculiar cases. The collaboration of the States may easily be established, as, in the main, the interests of the States are not in opposition with each other. Sometimes however the interests of mankind and those of the States do not coincide, and the same thing may be the case with the interests of the various States. Besides, in all the branches of human activity which are to be considered as common goods of mankind, the individuals have created international associations, which sometimes are of great influence on the States and their unions.

Agriculture. There are more branches of activity, connected with the soil, than agriculture, but I shall call special attention to the latter. A first thing to be noticed is that mother earth, without paying the smallest attention to the political frontiers, has traced boundaries for the culture of many agricultural products. There are many regions, the products of which cannot be cultivated in other

regions. Even the continents have sometimes natural monopolies. A commercial exchange of products must necessarily follow, each nation being, in this sense, tributary to other nations. A second point is that, although the development of agriculture is of national as well as of international interest, a certain opposition of the interests is not entirely excluded. There is an agrarian protectionism. The supervision of a State at its boundaries on the importation of cattle and agricultural articles of food in general, is certainly justifiable in itself, but it may exceed the reasonable limits and become a disguised protectionism. With regard to this peculiar protection it must be noticed that the experience of the economical consequences of THE WAR will probably induce the States to make attempts, which, as far as possible, will make them independent of the other States with regard to importation of articles of food. Agriculture has more international sides. A strong competition has arisen between some natural products and their chemical surrogates, e. g. between butter and margarine and between sugar and saccharine. The desire to protect nature against science has often induced the States to organize what we might call trials for witchcraft against the products, the names of which are as names of witches ending in "ine", as margarine or saccharine, and such trials are extremely sharp when the natural product is a national one and the chemical surrogate a product of foreign manufactures. The question of the sugar has its own international side, which is to a certain extent connected with protective duties. A group of States has come to an international agreement, but its durabillity is uncertain. Some other matters which really belong to the following section of the system, devoted to the prevention of evils, may be mentioned here as examples of the collaboration of States. I am thinking of the defence against noxious parasites and of the protection of serviceable birds. The International Agricultural Institute, founded in 1905 on the initiative of Italy, is very promising. A remarkable consequence of THE WAR, with regard not only to agriculture but also to mines, forests etc., is the increase of the control of the State on the production and the distribution of products of the soil. It almost approaches nationalization of the arable land. Such a

fact, in connection with the natural monopolies of some regions for various products, may be the cause of international troubles, perhaps even of quasi-commercial partnerships between States.

Industry. I beg to refer to my considerations about protectionism. The results of the collaboration of the States, on the domain of industry, are very remarkable, but they are so familiar that a mere mention of the subject-matters will be sufficient. I mean the patents for inventions, the trade-marks, the defence against unsound competition, etc. In this matter THE WAR has been a cause of trouble, which will probably be of a temporary nature only.

Trade. The foregoing considerations apply *mutatis mutandis* to trade. But trade is a cosmopolitan institution to such an extent, that the trouble, caused by THE WAR, cannot last longer than an attack of fever. Commercial law has always been the most progressive element in national and international civil law. I hope to refer to this point in the second part of the present chapter. I have still to mention the monetary question here, and the international unions in the matter of coins. The completion of an international unity of weights and measures is still a *desideratum.*

Science. Science has undoubtedly its national side, as well as the other branches of human activity. A nation may be proud of her illustrious scientists, they are a part of the national treasure of glory, the possession of which is an element of sound national feeling. But science is also a common good of mankind. Men as LISTER, PASTEUR, HELMHOLTZ or HUGO de VRIES do not only give rise to national pride, they belong to mankind. In its relation to a State science is free, it has its own sovereignty. But the development of science is a duty of the State, and therefore the State exercises correlative rights. National regulations may extend themselves to the organization of universities and public schools, examinations and other conditions required for the exercise of the professions connected with science etc. But in the domain of science, national isolation is not splendid. Universities are generally open to students of all nations. Aliens of a high reputation are often called to professorships,exchanges of celebrated professors are even concluded in a fraternal way between uni-

versities of various countries. The old rule, purporting that foreign examinations and foreign scientific titles were without any value, has had its day. Patriotism, in time of peace at least, does not at all exclude fraternal feelings between scientists of the same branch, who belong to various nations. In every branch of science international institutions or associations have been founded. THE WAR has also been a cause of trouble here. It is not impossible that, to a certain extent, it will strain out impurities. In the last part of the XIXth and the first decennium of the XXth century we have seen so many international associations and federations, so many congresses and so many yearbooks! If the thunderstorm of THE WAR could tend to a survival of the fittest, it would not be so very deplorable.

Arts. As science, they are national and international at the same time. A certain difference ought to be made between artistic branches which require the use of a national language, and more cosmopolitan branches as painting, sculpture, architecture, music etc., but even works of literature, poetry and drama not excluded, will find their way all over the world when they are masterpieces. A work of art has a more personal character than an invention; hence the international agreements relating to copyright are more developed than those relating to patents for inventions. As to these agreements, I refer to the international treaties and to the rich and able literature on the matter. THE WAR may disturb the joy connected with some foreign works of art, by bitter remembrances, but if art is divine and eternal and martial feelings are human and transient, things of beauty will be a joy for ever, even when the artist has been a foe.

§ 23. *International Means of Communication.*

General remarks. I must certainly mention the means of communication in the present section, but, with regard to this subject-matter only a few observations are necessary. The cosmopolitan character of the means of communication is beyond doubt and the collaboration of the States is such a positive requirement of a reaso-

nable international social life, that the question is only which would be the best manner of collaboration. I shall also have to refer to other paragraphs. In the §§ 11—13, I have dealt with the earth, the waters and the atmosphere, as goods destined, although only in general, for the common use of mankind, and I have only to point out here that, with regard to the means of communication, such a destination is as evident as possible. There is a remarkable, although illogical relation between protectionism and the development of quick and cheap means of communication, the repulsive effect of protective duties on foreign products being counterbalanced by the good effect of easy means of communication. It is well known that THE WAR has been prejudicial to the collaboration of the States, with regard to our subject-matter, but it may be expected that, after the war, the advantages of this collaboration will be more valued than they were before.

The international agreements. I quote in the first place the treaties relating to the *postal* and *telegraphic services* and to similar institutions. The postal world's union is well-known. In § 12 the communications on the *high seas and the other waters* have been mentioned. The treaties relating to *collisions* and to *salvage* have been mentioned also. An international treaty relating to the *means of salvage, which are to be on hand on board of ships*, has been elaborated. The same treaty contains regulations about ice-fields in the Atlantic. A terrific disaster, nearly forgotten after a succession of other calamities, has been an inducement to the organization of a survey of the floe. The international unification of the law relating to freightage has been projected. With regard to other parts of the international law of maritime trade, associations of jurists, merchants, shipowners and underwriters have proved that noticeable reforms could be brought about by private initiative. The International Law Association has made the celebrated York-Antwerp-Liverpool rules, relating to *general average*, of practical worth. Charter-parties, bills of lading and other commercial documents refer to the said rules. As to the communications on land, the Bern treaty relating to the *carriage of goods on international railways* has constituded an impor-

tant step in the direction of uniformity of law; a great part of the treaty is founded on international-common principles of administrative law. The technical unity of railway traffic has also been the object of international agreements. A common international law relating to motor-cars is to be found in a well-known treaty, concluded in Paris; the uniformity of the etiquette of the road is yet a desideratum. As to airships, I have pointed out in § 14 that as soon as they will become a regular means of private, commercial and postal intercourse, an international regulation will be indispensable.

Sixth Section.

PREVENTION OF SOCIAL EVIL.

§ 24. *General Views.*

Preliminary observations. In the present section I use the expresion preventive police, in a broad sense, indicating the system, in which measures are taken by public powers in order to prevent social evil. The preventive aim distinguishes the measures, to be discussed in the present section, from those dealt with in the foregoing section. Mankind is entitled to a preventive police with regard to the human species, but it is exercised by the States, as the local representatives of mankind, within juridical limits. Not considering the continents, which in our days are not organized, we find an interjacent power between mankind and the States, which also exercises a preventive police, viz. the unions of several States. We therefore distinguish here a police of the State, a police of unions, and a general or universal police.

Preventive police of the State. As a consequence of the harmony which also exists here between the interests of mankind and those of the State, the sovereignty of the State, as to the preventive police, is almost unlimited. Mankind, even if it should be completely organized, would not centralize the preventive police, but delegate the greatest part of its right to local powers who are nearer to the individuals, and more able to consider the local peculiarities. There

are however cases that require the intervention of an authority higher, with regard to its local power, than a State in isolation. Besides,unter certain cicumstances, the interests of a State may be in opposition with those of mankind.

Preventive police of unions of States. Such a police means the extension of social dangers, the frontiers of which may sooner be called natural "frontiers" than the existing or claimed frontiers of political groups. Some contagious diseases are "reigning", in a certain sense, over regions of the earth, continents or parts of continents, and the States, desirous to prevent the infection, are obliged, by the law of nature, to act as a collectivity within the boundaries of the disease. States, wich have common frontiers, take measures concerning the police of the frontiers, by mutual arrangement, States, surrounding a lake, may also have to make arrangements for a co-ordinate or collective police. It may even be the case that States, surrounding a part of the open sea which is used as a common fishwater by their fishing-fleets, have to come to arrangements with regard to the police of the fishery. The North-Sea shows us such a peculiar situation, and the Hague treaty, concluded in 1882, has been the result of it. The regulation of the authority of the surveying cruisers, inserted in the said treaty, is very peculiar, but not in disharmony with the reasonable principles.

Preventive general or universal police. There are dangers, the "natural frontiers" of which are those of the earth, and effective prevention may require an action of the collectivity. The pest, for instance, in contradistinction with the yellow fever, is such a danger I call the attention here to the difference between the egoistical quarantines of the "good" old time, and the international sanitary conventions. In the following paragraphs it is my intention to deal with some subject-matters, which show the necessity of a collaboration of the States and even an opposition between local and general interests.

§ 25. *Population.*

Individuals and Society. Is there on earth anything more

individual than the union of man and wife, welding together, according to the expression of our VONDEL, two red-hot hearts? It is my intention to deal with marriage, as an institution of private law, in the second part of the system, but here I call the attention to the relation between marriage and population. Marriage, in a reasonable social life, belongs to the domain of the personal sovereignty of a man and a woman, but we have seen, since the beginning of civilization, that religious and civil powers have interfered with the institution, called by the the Romans "communicatio omnium rerum divinarum et humanarum". The religions have placed marriage under the protection of the Supreme Being, the civil laws acted in the conviction that marriage is a thing of social interest. I shall frankly give my explanation of these facts. Religious and civil laws have been conscious of the influence of the union between man and wife on the quantity and the quality of the population. Neither religion nor civil laws have gone so far as to abolish the individual power of choice, and to impose a union upon a couple that was considered a good match, compelling that couple — as far as possible by religious or legal sanction — to procreate an official number of socially well-bred childern. Religion and State have interfered prudently and in a quasi-hypnotical way. They have established a radical distinction between marriage and free union, the former being agreeable to God and esteemed by one's fellow-citizens, the latter, on the contrary, being cursed, despised and even punished under certain circumstances. In this way marriage has been submitted to preventive conditions, for instance to the assent of the family, as a guarantee of social convenience.

Number. There are many circumstances which may influence in a bad sense the number of the population, as some diseases or too great a use of alcohol, which have an absolute effect, and emigration or war which have a relative effect in so far that they take away strong young persons. But the influence to which I must call special attention, is the voluntary restriction of procreation. Many able and highly interesting works have been published on the said subject matter by economical and medical authorities. Here two parties are sharply opposed to one another, one of which fights against the restrictive

means, whilst the other party promotes their propagation. I say, with the sincerity of a conscientious observer, that both parties are guided by the desire to promote the general welfare. The State may act in one way or in the other, if it does not consider it wise to abstain. But I am of opinion that sooner or later some idea will be influential, viz. the conviction that there is a relation between quantity and quality of the population, and that the restrictions are in so far detrimental to the quality as they do not call upon the best and fittest descendants to do the social work, but oblige Society to accept the very first.

Quality. We have already entered into this question at the end of the foregoing rubric. Many causes are influential here, for instance the war. To a certain extent medical science is prejudicial, as it saves the lives of undesirable beings and enables them to procreate. Rich heirs and heiresses are, in this sense, as much desired as they are undesirable. Too young people moreover, often take part in the procreation. It seems that unions between near relations are detrimental, in so far as they accentuate the bad qualities of a family. I take the liberty to mention the point, the nature of which is partly juridical. One of my colleagues at the Amsterdam University, a professor of medicine, has put his library at my disposal, in which I found plenty of works on the question. It was my intention to find the origin of the prohibition, established by religious and civil laws since immemorial times. But I must confess that I found such a discrepancy in the opinions of the learned men, that I went out of the library even less informed than before I entered. But be that as it may, the question of unions between near relations is a part of a broader question, viz. that of the transmission of physical and mental defects from ancestor to descendants. I dare say science has advanced very far on the way leading to the elucidation of the heredity-question, but apart from the progress of science, the participation of mentally or physically unhealthy persons in procreation may be considered as detrimental to Society. Quantity and quality are closely connected here, and the social measures, tending to the greater well-being of the working classes, wil certainly fail if the population, increasing in quantity, is going down in quality. With regard to such

a degeneration, I shall devote the last rubric of the present paragraph to the social struggle against it.

The social struggle against degeneration. I shall only discuss the possibility of a contrast between national and generally human interests and the necessity of a collaboration of the States, with regard to certain measures. The State is able to take many useful measures without interfering directly with the conditions of procreation. It may e. g. fight in an efficacious way against diseases as syphilis and tuberculosis, restrain the abuse or even prohibit the use of spirits, opium etc. The bad influence of heredity may be neutralized, to a certain extent, by careful education, under supervision of the State. The prohibitive conditions of marriage could be increased and made more severe; to persons affected with certain diseases marriage might be forbidden. The constitution of a special class of families, enjoying some privileges on condition of submitting their members to a social test before marriage, could be taken into consideration. It would be a kind of nobility, not unlike the existing nobility, as it was originally. I do not recommend the measure, I only mention it as a thing to be thought over. If the State dared to interfere directly and energetically with the procreation, it could interdict not only marriage but also procreation to undesirable elements. The extreme measure would be compulsory sterilisation. Such an interference could on one hand bring the national and the generally-human interests in opposition with each other, and, on the other hand, make an international co-ordination of the measures necessary. The desire to maintain the purity of the national blood could lead to an endogamic system, purporting the prohibition of any union of citizens with aliens or with natives in the colonies. Such a system would exceed the limits of national sovereignty. We may learn from history that States and nations may disappear from the earth, while mankind is going on. But there is also another international side to the question. If a direct interference of the social powers with procreation takes place, the necessity to co-ordinate the measures will appear as an unavoidable condition of their efficacy; even a collective action may be necessary. In such a case, the formidable question of the exact

limits between individual freedom and mankind's sovereignty will be put before the collectivity of States as the representatives of mankind, and an almost superhuman wisdom will be necessary to give a good answer.

§ 26. *Emigration and Immigration.*

The principle of the free circulation of individuals. According to the principles, every human being enjoys the right of free circulation on our Mother Earth, but such a right is by no means absolute, it is subjected to all the limits required by the reasonable order of society. As a logical consequence of such a right, it must be emphasized that the sovereignty of the State, in this matter, has juridical limits. In the positive law, these limits are not seldom exceeded, under the influence of the idea that the State is omnipotent. With regard to the inland social life, some States are even limiting the rights of coloured people or adherents of a dissident religious faith. As to international relations, the consciousness of a duty towards mankind is often lacking. International treaties relating to the settling of aliens do not exhaust the subject-matter.

Emigration, considered as the right to leave. I do not speak of expatriation, as in the Englisch juridical language, the term may have the sense of renunciation to allegiance. A State has undoubtedly the physical power to close its frontiers hermetically — for an insular State the thing may be relatively easy — but it is only a physical power. In times not yet far away, some States have endeavoured to retain their subjects, on the ground that emigration would deprive the States or their rulers of labourers or soldiers, and even, in a certain sense, enbezzle the expenses of the education they had enjoyed, but such a selfishness has almost disappeared. Moreover, in our days, emigration is often considered from quite another point of view. Emigration, according to more modern ideas, is not disadvantageous to the State, apparently deceived by ungrateful runaways; the emigrants have a patriotic heart in their bosoms, in a political and economical sense they are colonists, devoted to the interests of

the fatherland. Only a step further would lead a State to attempt to promote the emigration of the undesirable part of its population, but such an endeavour would meet with the strongest reaction from the side of the other States and would most probably be a failure. The same reason has caused the banishment of criminals almost to have disappeared.

The protection of emigrants in transitu. Such a protection has become much more extensive. It has been said that the protection is a matter of humanity; I am inclined to consider it as the consciousness of a juridical duty towards the human species. The national laws, which regulate the protection, show a resemblance. New laws are copies of the best foreign laws, confirmed by experience. The aim of the various laws is quite the same. An international regulation has been projected. I beg to refer to the yearbook of the *Institut de droit international*, XVI, page 53.

Immigration as a right to enter and to settle in a foreign State. An international-common law has granted a State the right to keep undesirable people at a distance. Such people include habitual criminals, unhealthy or sick individuals, rogues and in general persons who would immediately fall to the care of benevolent institutions. There must be a reasonable ground for not allowing a man to enter a country. *De facto*, the prohibitions may be framed with a protectionistic purpose, as has been said in § 21. The system of passports, which had nearly disappeared before THE WAR, has found strength again during the war. Besides, in time of war the immigration-question is influenced by martial considerations. The international treaties, generally concluded between neighbouring States, are mentioned again in passing.

Expulsion. The expulsion of the own subjects would be very much like administrative banishment. With regard to aliens, there is, according to the principles, a close connection between the repulse of emigrants and the expulsion of settled aliens. If the causes justifying a repulse appear to have existed during the time of admission, or if they arise after a justified admission, a right of expulsion will come into existence. But the positive laws, apart from the treaties

which regulate the matter with regard to the contracting States, are generally framed in expressions of such a range, that aliens, undesirable on political grounds, may be expulsed. Notwithstanding, the purely arbitrary expulsion will be a wrong, a violation of the duty of the State towards an individual as a member of the human species, and such a wrong may be the basis of an action leading to indemnification. In general, however, the local laws of the State, which performed the act of expulsion, will be a bar to such an action brought by an individual before the Courts of the same State. But the State, to which the arbitrarily expulsed alien belongs, may eventually, especially where a treaty has been concluded with the expulsing State, exercise a pressure on the latter. Such a pressure certainly does not prove that a wrong has been committed. Reprisals would be detrimental to innocent individuals, as is generally the case with reprisals.

§ 27. *Material Dangers.*

Preliminary remark. The nature of the subject-matter is so obvious that it will suffise only to mention the existing international agreements. The literature, in which the details may be found, is very rich indeed.

Diseases of the human species. I have already pointed out that some diseases have their natural frontiers. Tropical diseases prevail.... in tropical regions. The States, situated in the dangerous region, are obliged by natural reason to take co-ordinate or collective measures of defence. The defensive measures taken by the States and colonies, lying in the empire of the yellow-fever, in order to destroy the bearer of the contagion, are extremely remarkable. In the centre of the black continent, where the tsetsé-fly masters the realm of the negro-lethargy, a collective fight has been started. Other diseases, as cholera and pest, are a universal danger. Uniform or co-ordinate measures which are necessary to exterminate the ship-rats, the indirect agents of the contagion, have been taken. In general, the various sanitary conventions, concluded between the States, are to be mentioned here. The dangers of the universal plagues have

done much more than many extensive treatises on the so-called "law of nations", they have made the human species conscious of being a community of mankind.

The animal Kingdom. Cattle-plagues are, to a certain extent, a universal danger, but the measures taken in order to combat them are generally local ones. Two neighbouring States, however, may feel the need of an agreement. The sound development of an international cattle-trade will require the official survey, which is held at the place of exportation, to be satisfactory to the authorities of the country of importation, as a double official interference would be useless and detrimental. Sometimes, in practice, the complication of the measures, in the country of importation, is intentionally promoted, as a measure of agrarian protectionism. In future times, the protection of the world, with relation to cattle-plagues, might become international, and in case of need lead to an isolation of the contaminated State or region, for the sake of mankind. There are still more international measures, connected with the animal Kingdom. I shall only mention them in passing. Useful species are protected, in the literal sense of the word, for the sake of agriculture, fishery or hunting, by measures taken in the interest of mankind. Parasites or noxious species, on the contrary, are destroyed.

Diseases and parasites of the vegetable Kingdom. It will be sufficient to mention the international agreements relating to the parasites of the vine and the potato.

Noxious elements. Alcohol, opium and some other things are the cause of abuses, which constitute a moral as well as a material danger. The prevention is generally an object of national care, but a collaboration of the States may be necessary. Spirits are often the object of national taxes, the proceeds of which are uncommonly high, the relation between the product and the exchequer is an empediment to international interference. Some international treaties, as the Hague treaty of 1884, relating to the spirit-trade in the North-sea fishing waters, and the antislavery-act of Brussels 1890, (Artt. XC—XCV) contain regulations about the spirit-trade. Neighbouring States have also been obliged to frame collective regulations relating to

the spirit-trade in the region of the frontiers. As to opium, morphine and cocaine, the necessity of an international interference seems to be generally recognized. The treaty, planned at the Hague, in a conference held in 1912, mentions in its motives "necessity" and "common advantage" as two forces working in the same direction.

§ 28. *Moral Dangers.*

Preliminary remarks. I shall confine my observations to two moral dangers of Society, *slave-trade* and *prostitution.* The measures which have a tendency to root out the slave-trade, would certainly deserve a long and thorough discussion, but the elements of such a discussion are to be found in the general treatises and in special works. I only call the attention to the principle of the international collaboration. Prostitution is not only a moral danger, but also a material one, on account of the terrific disease connected with it, but I have dealt with the matter in this paragraph, because the international measures, which have been taken up to the present time in the matter, are relating to the moral dangers of some professions connected with prostitution, and because the prostitution would remain a moral danger even when science would be able to prevent and to cure syphilis. The prostitution-question is in so far an international question, that all the States are equally interested in it, but as to the administrative measures, to be taken in order to combat prostitution as a social evil, there are such great divergences of opinion, that a collaboration is not to be expected very soon.

Prostitution as a social evil. I am exclusively thinking of the professional prostitution of women; the other species belong to the domain of pathology and of criminal law. The professional prostitution of women is connected with many other matters, it is a part of the general social question. A definitive solution of the prostitution-question will only be attained, when the conditions of social life will have undergone a radical change. The question is not yet ripe for a universal administrative regulation. I only mention the bodily inspection, a question not even ripe

for a general regulation in national laws. As an inpartial observer of the phenomena of life, I express the opinion that the supporters and the opponents of the bodily inspection are acting in the conviction that they are promoting the general welfare of Society.

The professional appendices of prostitution. Here we do find positive international regulations. To begin with, I would call the attention to the so called trade of women, as an auxiliary of prostitution. This detestable profession has an international side: its victims are reduced to a helpless condition when they are sent to foreign countries. Neighbouring States have taken the initiative of co-ordinated regulations, but the development of the means of communication has made quasi-universal measures necessary. One of them is the Paris international arrangement of 1904. In the year 1910, a convention concluded in the same city established more circumstantial rules. In the same year 1910, and also in Paris, a convention relating to *immoral publications* was concluded. The circulation of the said publications had become international, and the prevention had to become international too, in order to be effective. The measures, mentioned in the present rubric, are certainly the germs of an international preventive police.

Seventh Section.

PUNISHMENT.

§ 29. *Criminal Law as a Part of international Science.*

Preliminary historical remarks. Punishment, among the antique nations, was not equibalanced. It grasped too low on one side, and too high on the other. It grasped too low in so far that private retaliation was admitted, and too high, in so far that God's ordeal was a regular trial. Between these two extremes, social punishment was finally established. A universal science of criminal law was created on this basis. It contains many and many disputable points, but even the disputes are universal. Fraternal links have been formed between the learned jurists of the various nations. An international

criminalistic association has offered important results. It is my intention to call the attention to some matters, belonging to the criminalistic science, as a common good of mankind.

The limits to the right of punishment. According to the principles, the only subject liable to punishment is the living man. Death will take him out of the reach of the wordly judge. Animals, inferior beings, are no longer justiciable. Beings, in a certain sense "superior" compared to living men, States, provinces or cities, are not properly liable to punishment. In martial times, the word "punishment" is sometimes used, with relation to States, in order to indicate vengeance or retaliation. Retaliation may be painful, especially to the innocent subjects of a State, it is not a penalty. With regard to living men, the State, the representative of mankind, is entitled to inflict punishment, but in this matter too there are juridical limits. The idividual and the free groups of individuals have their sphere of sovereignty, viz. the realm of thought and feeling. The expression of a thought or the manifestation of a feeling may, under certain objective circumstances, be detrimental to the social order, but that is the extreme limit. The repression of political offences will easily exceed the limit, especially when the State has the intention to suppress thoughts or feelings. In our days, the world is progressing in relation to thoughts and feelings. Offences against the divine majesty are no longer punished by wordly judges. Heresy is no more a crime. Trials for witchcraft, in the old sense, have fallen in disuse. Even some crimes against the sexual morals, for which, in old times, the simple penalty of death was not heavy enough, very often remain unpunished, not on account of indulgence, but because of pathological considerations, or even because the State is of opinion that the judicial proceedings, in casu, are a greater social evil than impunity. Many points, connected with the foregoing remarks, are disputable and are being disputed, but even the disputes are international ones.

The person of the offender as an object of scientific investigations. The last observation of the foregoing rubric is applicable here. The system of the inborn criminal type has its adherents, the system according to which the influence of education and surroun-

dings is predomineering has also its supporters; there are mixed and intermediate doctrines. The philosophical question: "Free will or determinism?" is often disputed. Many other questions are connected with the examination of the body and the brain of the offenders. I wish to mention the question of juvenile offenders, the exclusion or attenuation of criminal responsibility of insane offenders, the measures of social prevention which may be taken with regard to such offenders, and even the question of the "sterilisation" of habituals criminals.

The penalties. In our days the consideration prevails that the certainty of being punished is more powerful, for the prevention of crime, than the menace of a terrific and exacerbated punishment. The criminal laws of the various nations are the object of thorough comparative studies. New laws are often copies of the best foreign laws. The horrible penalties of the past, mutilations, branding etc. have been abolished. The pillory is no more in use. Flogging, as far as it is still in use, is an exceptional penalty. As to capital punishment in itself, there is no common opinion, but, apart from the scientists who consider the reference to the Holy Book a decisive argument, the dispute is a universal one. The antique exacerbations by means of fire, boiling oil, quartering, breaking upon the wheel, etc. have vanished for ever. It may be disputed whether preference is to be given to hanging, decapitation or electrocution, but the only question is how capital punishment may be made as humane as possible. I have already mentioned the international side of banishment. As to the organization of the prisons there are many and many thorny questions, but the "thorns" are international ones, as the interests of the nations are entirely concordant.

§ 30. *The repressive Power of the State, acting in Isolation.*

Preliminary remark. The right of the State to punish offenders, on its own account, is not questionable. But, in exercising this right, it may come in contact with the social life of a juridical community,

larger than its own local sphere of national social life, and it may therefore be obliged to consider the right of punishment from a larger point of view than the local one. National laws, in such a case, have an international aim. We have by no means to deal with so called conflicts between criminal laws.

The field of application of the national criminal laws. We must bear in mind that the question, asked in the rubric, does not coincide with the question of the *jurisdiction of the national judiciary in criminal matters*, although, in positive law, the two questions are twined together, because the States are inclined to avoid the application of foreign criminal laws by the national Courts. The comparison of the various national laws discloses various very remarkable principles, laid down in these laws with regard to the field of application of the national criminal law. The principles are not only manifold, but very often the laws are not even based on a unique principle, and admit several principles which cross each other at the same time. In this way, the field of application of the national law is exceedingly extensive. I shall begin with a simple enumeration of the said principles, and I shall give each of them a short name. In the first place we find the *universality-principle*, purporting that an act answering to the delineations of a penalized act, which are laid down in the national law, is liable to punishment according to that law, wherever the action may have been committed. In the second place, we have to deal with the *nationality-principle*, a bifurcating principle which shows an active and a passive side. The nationality-principle presents its active side, when every action committed *by* a citizen, and falling under the terms of the national criminal law, is punishable according to that law; the principle shows its passive side, when under the same circumstances, an offence has been committed *against* a citizen. An opposite principle, at least with regard to the denomination, is the *territoriality-principle*, according to which the national laws are applicable to every act, committed on the territory. And finally a fourth principle appears, viz. the principle of the *injured interest*, submitting every act detrimental to a national interest to the national criminal law. The territoriality principle is,

according to my opinion, the reasonable one, in an absolute sense; it is however, subjected to some exceptions. In the positive law we see that the territoriality-principle is really the domineering one, but it also appears that the State, in its isolation, is obliged to add, to the rules derived from the territoriality principle, a series of other rules which in special cases purport the application of all or nearly all the other principles. If beyond the territory actions have been perpetrated which injure a national interest, the State is not certain that the foreign State, on the territory of which the act has been committed, will punish the offender, and the result is that the State, the interest of which is injured, will punish the offender if it is able to do so. If the State has excluded the extradition of its own subjects, it will not be willing to grant impunity to the subject who, after having perpetrated a crime in a foreign country, takes a refuge in his fatherland; hence, the principle of active nationality is applied in such a case. If the State has the desire to protect its own subjects who are abiding in a foreign country, such a State will apply the passive principle of nationality. Even the universality principle is applied in certain cases, especially in the case of piracy, a crime often perpetrated on the high seas on board of a ship without a flag. I shall not enter into a further discussion of the principles, which are familiar by the literature; to me the main point is that the State has to choose between the principles and to regulate their application. This application may imply many accessory difficulties. The territoriality-principle, for instance, will necessitate a delineation of the expression territory, especially with regard to the so-called floating territory, the merchant-ships. The place, where an act has been committed may be ambiguous, in a juridical sense. The same thing may be the case with regard to the offender's or the victim's nationality.

The official preparation of the case and the criminal procedure. The officials of a country will certainly apply the law of that country in the criminal proceedings. Such an application is in accordance with the reasonable principles, no rule concerning the conflicts of laws is necessary. But the matters, quoted in the rubric,

may show an international side. When a crime has been committed in a State, and the legal proceedings are conducted in another State, the officials of the latter may have to call in the assistance of those of the former, in order to prepare the case for the trial. Such an assistance is generally granted, which is in conformity with settled customs or treaties. Sometimes the official preparation takes place collectively by the officials of the two States, connected with the act or the trial, on the exact boundary-line. If the case has its international side, it may appear during the procedure that the accused or one of the witnesses is not acquainted with the local language, or that an oath must be sworn in a particular form. I only wish to point out that such cases must be regulated. Last not least, I emphasize that criminal procedure, as a branch of the criminal science, is a common good of mankind. I beg to mention, for instance, the matter of the trial by jury.

The legal effects of a foreign criminal sentence. I shall only deal here with the effect of such a foreign sentence in a local criminal trial. I shall not discuss the effect of a foreign criminal sentence in a local civil procedure, for instance as a cause of divorce. The case I have in view is the following one. A culprit is brought for trial before a local Court, the jurisdiction of which is not dubious, but it appears that he has already been submitted to a trial, for the same act, before a foreign Court, and that, for instance, he has been condemned or absolved by the said foreign Court. I shall omit other particulars. In the case I have indicated, one could say, from an egoistical point of view, that acts of foreign officials have no effect at all in another country. The result might be a condemnation of the culprit, even in the case of a foreign absolution or of a foreign condemnation, followed by inflicting a punishment. Considered from such a standpoint, a pardon granted by a foreign sovereign or the expiration of the right of prosecution in conformity with a foreign statute of limitations, would naturally be without any effect in another country. But I wish to emphasize that this result would be contrary to the reasonable principles, as a second social reaction is not necessary, and therefore not justified. The positive law, in the cases I

speak of, is very often in accordance with the reasonable principle and follows the rule "non bis in idem!"

§ 31. *The co-ordinate Action of several States.*

General remarks. I have already pointed out that the States have considered piracy as a crime against mankind. In the time of the navigation with sailing vessels, the general peril, apart from war and privateering, was greater than in our days. The juridical conception of piracy is not fixed by an international-common rule, but it is universally admitted that every State is entitled to punish pirates. In modern times many international treaties have been concluded, according to which the contracting States are bound to enact fixed penalizations, or at least to submit drafts of laws, which tend to this aim, to the legislative power of their country. I wish to mention, for instance, the treaties relating to the North Sea fishery (§ 24), the protection of submarine cables (Paris treaty of 14 March 1884): and the treaties relating to professions connected with prostitution (§ 28). There is however a well-known institution which deserves more than a simple mention. It is the extradition. It is not at all necessary to devote a monography to this subject. It has its literature, and I shall only underline a few data.

Extradition. The system of extradiction has succeeded an egoistical system, the system of the asylum, in which the idea of a co-ordinate action was entirely wanting. Extradition, on the contrary, is undoubtedly such a co-ordinate action. According to the principles on which the present system is based, the fact that the matter is regulated partly in national laws, with an international tendency, and partly in international treaties, is not at all extraordinary. Whether, apart from the treaties by which a State is obliged to extradition, it is a duty of a State or only an act of comity, in the sense of a pure friendly service, is a disputable question. I should think that when we have to do with a felony which is penalized in the laws

of all the civilized nations, and which, at the same time is of a non-political nature, extradition is a duty towards mankind and its local representatives. This duty does not extend itself to political offences or to offences connected with politics, as the elements of such offences are vague and the impartiality of the local judiciary is often dubious. The conception of political offences is disputed, and the exact delimitation of offences connected with politics is very arduous. There is no common doctrine here, sometimes the text of the treaties will furnish some data. An extradition of the own subjects, granted by a State, is not in contradiction with the principles, but very often laws and treaties are explicitly excluding it. Such an exclusion may be founded on mistrust, although this argument is not very strong, as no member of the human species ought to be delivered to a mistrusted foreign authority. A somewhat better argument is that a State ought to grant the guarantees of the national criminal procedure to a citizen. Be that as it may, it is a fact that the exclusion of the extradition of the own subjects is influential both on the field of application of the national criminal laws, and on the national jurisdiction in criminal matters. The institution of extradition, besides, has not attained its full development. An international regulation is desirable, Scientists of the greatest reputation have prepared such a regulation. It is, by no means, an easy attempt.

Eighth Section.

JURISDICTION.

§ 32. *General remarks.*

The conception of the term "jurisdiction". Jurisdiction, in its international sense, is the only subject to be dealt with here. Jurisdiction, considered in itself, is the power to find and to establish the decisive rule in a law-suit. This power includes reasonably the compulsory execution of the decision. The term jurisdiction is taken in an international sense, when the entire judiciary of a State viz. *the collectivity of its courts and judges considered as a unity*, is opposed

to the collectivity of the courts and judges of another State, also considered as a unity, and the question arises in which cases one or the other collectivity is entitled to find and to fix the decisive rule in a law-suit. When the jurisdiction of an arbitral court is meant, the term jurisdiction is taken in a particular sense, which I shall discuss in the following section.

Jurisdiction and territorial limits of the application of a national law. I have already pointed out that the two subjects are to be distinguished from each other, although we shall see very often that a State, extending beyond the reasonable limits the field in which its own laws are applied, will be inclined to extend the jurisdiction of its judiciary to the same limits. The application of a national law is justified according to the principles, when a *juridical relation* belongs to the local sphere of social life, in which this national law is in force. Jurisdiction, on the other hand, is justified when the *real elements of a juridical contest* are so closely attached to a State, that the reasonable order of international social life requires the decisive rule for the solution of the said contest to be found and fixed by the judiciary of the said State.

Jurisdiction and execution of foreign judgments. The existence of jurisdiction is the main condition for such an enforcement. I shall discuss this subject-matter later on. I have dealt with the jurisdiction in the first part of my system, which part is devoted to public international law, and I shall treat the execution of foreign judgments in the second part, the contents of which belongs to private international law. Such a division is justified, firstly by the fact that the question of jurisdiction is not only to be discussed with regard to contests relating to private juridical relations, but also with regard to administrative and criminal contests, and secondly because, in contests relating to private juridical relations, the rights of the individuals, as parties in a law-suit, are the domineering point.

Jurisdiction and competency. Here too the two subject-matters mentioned in the rubric are to be distinguished carefully. A question of competency only arises when the national judiciary is composed of various degrees, higher or lower in rank, or when the

judicial organization contains more than one court of law of the same rank, so that the law-suits are to be divided among the various courts of the same rank. In both cases the decision exclusively depends on national regulations. It is not advisable, therefore, to use the expression "international competency" with regard to law-suits, as it would be a source of misunderstanding.

Positive law. If mankind were an organized body, the supreme directing power in mankind would not attempt to centralize the jurisdiction. Such a central power would, on the contrary, attempt to distribute the jurisdiction reasonably, and therefore grant it to the collectivity of the courts and judges of the State, to which a contest is attached by its decisive real elements. The positive laws, on the contrary, are inclined to maintain that a State is entitled to regulate the jurisdiction of its own judiciary with absolute sovereignty, without any other limitations than those established by international customary rules or inserted in international treaties An evolution, however, is gradually developing, as a consequence of the desire to guarantee the execution of national judgments in foreign countries, a result which will not be attained as long as the jurisdiction of the national courts is extended beyond its reasonable limits.

§ 33. *Jurisdiction in administrative Matters.*

Contests belonging to the sphere of local administration. The State to the local sphere of which the contest belongs by its real elements, is reasonably entitled to jurisdiction with regard to this contest. The attribution of jurisdiction is a very easy thing when all the real elements of the contest are connected with the same local sphere. If this is not the case, the reasonable jurisdiction depends on the question whether the local elements or the foreign or international ones are predominant. It is therefore possible that an administrative contest must be considered as a local one, even when a citizen domiciliated in a foreign country or an alien domiciliated in the country the jurisdiction of which is questionable, is a party in the contest. The contest will be a local one when really the local elements are predominant, a thing which may often occur in contests relating to military duties or to

taxation. The question is not always an easy one to be sure, and we shall discuss that in the last rubric of the present paragraph. There is no international common rule in positive law. It may however be considered a matter of fact that the Courts of a State do not interfere with a contest, when a decision would be a direct interfering with the local administration of another State. I underline the word "direct" on account of its extensible meaning. An evolution might proceed from judicial precedents.

Contests belonging to the sphere of international administration. The only contests I have in view here are contests which are to be decided according to the rules of the international administrative law. Political claims or counterclaims are not a matter of discussion in this rubric. International contests relating to administrative law will generally, though not exclusively, arise between two States or between two public corporations, that are no subdivisions of the same State. According to the reasonable principles, mankind, or supernational representatives of mankind, continental authorities for instance, ought to have jurisdiction with regard to such contests. But, apart from a few fluvial commissions established by international treaties, whose jurisdiction is a strictly limited one, supernational courts for administrative contests between States or between public corporations belonging to different States, only exist hypothetically. Such courts are only a *desideratum*. International arbitration, which will be dealt with in the following section, is perfectly fit to lead to a decision in such contests. It is the right way of evolution, the final aim of which would be the constitution of an international administrative court.

Contests relating to the question whether another contest is a local or an international one. Such contests may arise, especially between States. Contests relating to the admission or expulsion of aliens in a State may, for instance, be ambiguous in the said sense. A contest of an administrative nature, between a State and an individual who is not a subject of the State, may be very severe, when the State, to which the foreign individual belongs, interferes to protect his subject, on the subjective ground that the latter has

been ill-treated by the foreign authorities. The want of a supernational administrative court is clearly perceptible in such a case. If the relations between the two States are friendly, an arbitration would lead to a pacific solution. But the observer of international social life cannot fail to notice the very delicate nature of such contests.

§ 34. *Jurisdiction in criminal Matters.*

Principle. The State ,on the territority of which the offence took place, has the best claim to jurisdiction. The strongest reaction to the offence may be expected from the side of the authorities of that State. The trouble, caused by the offence, is in normal circumstances most perceptible in the local social sphere of the same State. The material traces of the punishable act and the means of evidence are usually to be found there. The place where the culprit was arrested or where is his domicile are more grounds for a distributive national competency-rule, than for an international grant of jurisdiction. In positive law the significance of such accessory elements of the criminal law-suit is greater than it ought to be according to the principle, in consequence of the extension of the national jurisdiction to many offences committed abroad.

Application of the principle and its extension. The conception of the term "territory" must be determined, especially with regard to waters and to merchant-ships. The fiction, according to which ships are a floating part of the territory, is not decisive. With regard to ships lying at anchor in a foreign port, there is no fixed international-common rule, a reasonable distribution of the jurisdiction between the local officials of the port and the authorities of the State, under whose flag the ship is sailing, would be a reasonable solution. As to the extension of the national jurisdiction far beyond the limits of the territoriality-principle, in the positive law, I beg to refer to § 30. Many causes, stated in the mentioned paragraph, lead the State to extend the *application of the national criminal law* to offences committed beyond the territority, and as in such cases a national authority must be charged with the prosecution, an extension of the jurisdiction, cor-

responding with the extension of the applicability of the law, is to be found in the positive laws. The real nature of such an extension of the jurisdiction is obvious in the case mentioned, namely that the extradition of the own subjects is excluded. As such subjects, at least when they have committed greater crimes, cannot remain without punishment, there is a logical necessity to grant jurisdiction to the local officials. It is evident that such a jurisdiction is not in accordance with the reasonable principle. The local officials have to prepare the trial and to judge, in a case relating to an offence, the material traces of which are far away.

Restrictions of the national jurisdiction. They are exceptions but they are founded, to the greatest extent, on a consideration as reasonable as the territoriality rule and confirmed by positive law. The various exceptions have been thoroughly discussed in works, published in my fatherland and in foreign countries, and a mention will be sufficient. A first restriction concerns the sovereigns the rulers of foreign States. As to the States themselves, I maintain the view expressed in § 30. States and other public corporations are not liable to punishment, and therefore no authority has jurisdiction on them in criminal matters. Other restrictions concern the diplomatic envoys and their official and non-official suite, the crews of foreign men of war or even of ships in the public service of foreign States, foreign military divisions etc. etc. The restrictions are founded on the reasonable consideration that a State has to recognize other States and their officials as local public powers or as agents of such powers, and that therefore any interference, detrimental to a regular exercise of the sovereignty of another State, is to be avoided. The principle, founded on the said reasonable consideration has the value of an international-common rule; it may therefore be utilized for the construction, in an extensive sense of the word, of the customary or written international law. The judicial precedents may in that way, prepare an evolution.

§ 35. *Jurisdiction in civil Matters.*

Principles. It will easily be unterstood, here, that the field of

application of a national law in a law-suit and the jurisdiction for such a suit are by no means coinciding elements. As to the reasonable jurisdiction in civil matters, we are able to form an exact idea of it if we presuppose that a supernational power, only desirous to act in conformity with the requirements of a reasonable international social life, has to indicate in which case the judiciary of a State, considered as a unity, will be entitled to find and fix the decisive rule in a civil law-suit. Without any doubt such an impartial supernational power would found the jurisdiction on the consideration, that there must be such a narrow relation between the real elements of a law-suit and the local sphere of social life in a State, that the reasonable order of social life in the community of mankind is guaranteed in the best way possible, if juridiction is granted to the courts and judges of the said State. But the statement of the fundamental principle would certainly not be sufficient to solve the whole question for that purpose; it would be necessary to form the principle very definitely and in case of need to extend and to restrict it, always on account of the reasonable order of international social life. In order to give the necessary precision to the principle, an investigation would have to be made into the various real elements of a law-suit. The domicile of the defendant and the situation of a good would have to be taken in consideration, in relation with the distinction between the law-suits in personam and those in rem, a distinction borrowed form the antique roman law, and confirmed by the international-common law of our days. Besides a great many special cases would be an inducement to make adequate rules. I do not give an enumeration of these cases, a few examples will do. I only wish to mention law-suits belonging to the sphere of family relations, divorce for instance, or to the hereditary law. An alternative grant of jurisdiction to the courts and judges of several States might be taken into consideration in special cases, the claimant would then have the right to choose. As to the *extension* of the principle a covenant between claimant and defendant could be influential. The election of a domicile for the performance of a contract or even the designation of a fixed place for such a performance, might be constructed in the way of an

extension of the jurisdiction in conformity with the clear terms of the covenant. A *restriction* of the jurisdiction could also be deduced from a covenant, the attribution of the decision to arbitrators. Some restrictions, which are being derived from the positive public international law, and which are relating to privileged corporations or persons, would of course be admitted. Although the various data of the present rubric are only based on a hypothesis, they are an elucidation of the question of a reasonable jurisdiction, extended and limited as it ought to be.

The general lines of the national positive laws. Positive law, in general, is based on an absolute sovereignty of the State, which is only limited by egoistic considerations of its own interest or by the desire to obtain an advantageous reciprocity from other States. The positive regulations very often extend a State's jurisdiction beyond the reasonable limits. As to the exact construction of the restrictions relating to foreign public corporations, restrictions which are based on international customary law, this is a matter of dispute in practice.

The extension of the national jurisdiction in the positive national laws. A lawgiver is often inclined to admit that his task is to facilitate, as much as possible, the civil actions of his own citizens — or of persons whose domicile is in his own country — against aliens, especially when the latter are domiciliated abroad. The foregoing egoistic consideration is the intellectual key to a great many particular regulations, according to which the place where a contract has been concluded, or the place where it must be performed, or especially the nationality of plaintiff or defendant are considered as real elements, leading to a particular grant of jurisdiction. I do not wish to criticize circumstantially, it will be sufficient to point out the opposition between the principles and some positive laws. We often hear the affirmation that such an extraordinary jurisdiction is necessary because foreign jugments are not executable by compulsion, but this is a *circulus vitiosus*, because the compulsory execution of foreign sentences is denied just on account of the abusive extension of the jurisdiction of foreign States.

The restrictions to be found in positive law. I shall mention only *pro memoria* the restrictions deriving from a covenant between the parties e. g. an attribution of jurisdiction to a foreign arbitral court. Here the main point is the question whether a State, in civil matters, has jurisdiction with regard to civil claims, directed against another State. In my opinion a State, the local representative of mankind, has no jurisdiction on another State, which the former is bound to recognize as a local sovereign. I will add that the fact of a State being the debtor, constitutes such a narrow relation between the law-suit founded on the debt and the local sphere of social life of the State-debtor, that exclusive jurisdiction is to be granted to the courts and judges of the State-debtor. In practice the question is disputed. Jurisdiction has been admitted without distinction, it has been denied in the same way, and it has been admitted in some cases and denied in others. I shall not enter into a polemic, and beg to refer, especially as to the distinction between the various cases, to the literature and the resolutions of scientific corporations. It may finally be expected that practice will lead to an international common law.

Evolution. I shall only mention a powerful mowing spring, to be discussed in the second part of the system It is the desire to come to an international recognition and enforcement of foreign judgments.

Ninth Section.

ARBITRATION AND JUDICIARY.

§ 36. *Is an international Judiciary only a Dream ?*

The hypothesis of an international judictary. It is rather easy to concieve the establishment of supernational courts. There are many projects, well known in the literature. There might be continental courts between the national courts and the central court of the world. Special supernational courts could be called in existence for contests of a definite kind e. g. for contests relating to trade in general, or especially to maritime commerce, bills of exchange etc. One of the greatest impediments in all these matters, if not *the greatest*

of all in the domain of public law as well as in that of private law, would be the regulation of the jurisdiction.

Are there any traces of the beginning of an evolution? The powers granted to international fluvial or sanitary commissions are only very feeble signs. An international prize court, in accordance with the projects elaborated in the Hague and in London, would have been a real beginning. The wellknown draft of the London Declaration is, in my opinion, an evidence of the fact that the international world was convinced that reasonable principles of prize-law were not to be found, and that only a positive regulation could be the basis of the decisions of the projected International Prize Court. The most significant sign of the beginning of an evolution, as to the establishment of an international judiciary, is the development of the arbitration for contests between States.

The best method to be followed for a discussion of the international arbitration. The way, which will lead to our aim, starts at the arbitration between individuals, and I shall therefore in the following paragraph call the attention to the international sides of the arbitration between individuals. The elucidation of these international sides is the best introduction to interstate arbitration.

§ 37. *The international Sides of Arbitration between contesting Individuals.*

Principle. The national laws are not exactly conform, but they have the fundamental rule in common. Individuals are entitled in normal cases to grant jurisdiction for a contest, to men who the parties consider as trustworthy, and to exclude the official judicature in this way. It is really a recognition of the personal sovereignty of the individuals. Consequently the arbitral award is to be considered, in principle, as a fixation of the law relating to the contest, and if a compulsory execution is necessary, such an execution must be granted, at least indirectly. The international questions connected with a simple private arbitration derive, on one hand, from the fact that the contest may have an international nature, and on the other hand, from the fact that the arbitral court may be called a "foreign" one.

The international nature of the contest. According to the reasonable principle, confirmed by the international common law, parties must have acted in the sphere of their personal sovereignty, they must have personal capacity and free disposition of the rights involved in the contest, their agreement must be valid with regard to its form as well as with regard to its contents. Many of these points may be connected with rules or principles of private international law, that are disputed. In accordance with the concision observed in this system, I shall only point out that the official judiciary may have to solve the questions mentioned, when a party refers to an arbitral agreement or to an arbitral award.

The fixation of the law in the contested matter, by the arbitral award. A distinction will have to be made here between a "national" arbitral award and a "foreign" one, and the delineation is by no means easy. It is obvious that when there is no reason to deny the character of a national award to the arbitral award, this award — being subjected to the national rules relating to appeal, empeachment for fraud etc. — is a fixation of the law in the contested matter. But will the same thing be the case if the award is a foreign one, and, if so, what is the distinctive sign? A foreign judgment will be easily distinguished from a home judgment, but how it is here? In my opinion, the distinctive sign is the place where the arbitral court is sitting, according to the agreement, but in addition I maintain that if the arbitral award is regular, with regard to capacity, right of disposition, form and contents, it is a fixation of the law in the contested matter, even when the arbitral court is a foreign one. Practice is generally in accordance with this thesis.

The eventual enforcement of the arbitral award. A similar distinction has to be made here, because although the problem is clear enough when the award is "national" it may be disputable when it is "foreign". According to the reasonable principle, the question of the enforcement is closely connected with the question of the decisive force of the award. When the contest is decided, the condemned party ought to be obliged to obey, even when the award is a "foreign" one. The positive laws and the practice are not absolutely

adverse to the ressonable principle, but there are two ways to attain an inforcement of a foreign award, a short way and a circuitous one. The short way is enforcement in accordance or nearly in accordance with the rules enacted for national award. The circuitous way requires a new law-suit, founded on the foreign award as a conclusive title, and leading to a national judgment, enforceable in the ordinary way. The end is a compulsory execution after all. In the international treaties, relating to the execution of foreign judgments, foreign arbitral awards are generally mentioned.

§ 38. *Arbitration between States.*

Preliminary remark. The length of the present paragraph is not adequate with the importance of the topic, but the literature is rich and I beg to refer to it. My only aim is to investigate a few questions, in order to ascertain if there is an evolution in the direction of a supreme international court — in the sense of a supernational one — and to measure the eventual impediments. I must most respectfully mention some institutions of the positive international law, viz. mixed commissions, commissions of inquiry, good offices and mediation. Such measures may lead to an interstate arbitration.

The nature of the contests. The history of the international arbitration has shown that political and juridical contests must be distinguished. *De facto* the distinction ought to make three divisions, as there are two kinds of political questions, malicious and benign ones. Juridical contests are generally fit for an arbitration, malicious political contests are, on the contrary, not fit for it, but between these two kinds, we find mild or good-natured political questions, which are perfectly adaptable to arbitration in so far that both States will prefer losing the law-suit to war. In practice, the political contests submitted to arbitrators have been free from malignity. Such arbitrations promote evolution.

The agreement. There may be an agreement posterior to the origin of the contest, or the stipulation may have been made that future contests are to be submitted to arbitrators. The two forms

are in use with regard to arbitral agreements between individuals, but while for the latter the question whether an agreement generally relating to future conflicts is valid, is not always solved in the same way, the Hague conventions have purposely stated that interstate agreements may concern future contests. It is plain that the latter form is the way of the evolution. But a distinction between malign and benign contests ought to be made here too. I am thinking of the terms of treaties of arbitration, which contain provisos relating, for instance, to the independence, the honour or the vital interests of the contracting States. It will not be necessary to enter into detail. There are treaties without provisos, but the provisos certainly are an impediment to the evolution.

The organization of the arbitral court. There are undoubtedly some delicate matters here, but the Hague treaties have shown that when there is a will there is a way.

The international enforcement. Up to the present time a regular execution is wanting. This fact is not without importance, but its importance must not be exaggerated. With regard to juridical or benign contests the moral force may be sufficient, whilst as long as there will be malign political contests, an absolutely decisive result will not easily be obtained.

The final aim. I see it, as a magnificent building, on the summit of a hill. I see the way leading to it. THE WAR will perhaps conduct mankind to the summit, but the building, erected on the top, will have to show the solidity of its foundations, at the time of the next earthquake.

SECOND PART OF THE SYSTEM.

Private international law

Tenth Section.

JURIDICAL RELATIONS IN PRIVATE INTERNATIONAL LAW.

§ 39. *General Views.*

Juridical relations. Every system of private law is based on the preconception of juridical relations. That is a reason to me to devote the first section of this part to it. I am aware of the fact that the conception of the juridical relation is more a part of the science of jurisprudence, as a common good of mankind, than an element of positive law, but the section, in which the juridical relation will be discussed, is of value as a general introduction to private international law. I shall scrutinize, with my usual conciseness, or even with a greater one, first the general conception of the juridical relation, and then its elements. The juridical relation is a link between two persons or juridical subjects, a link formed and maintained by the social public power, the link being at one end a duty, and at the other end a claim corresponding to the duty. The claim, confirmed by Society, becomes a right. Duty and right may be reciprocal. There may be more than one subject on the duty-side or on the claim-side. The duty may be charged, by Society, on the generality of one's fellow-men. In such a case the right is an *absolute* one. If, on the contrary, the duty is only imposed on one or more definite persons or subjects, the right is a *relative* one.

The juridical relation in the antique doctrine, called the doctrine of the "Statutes". The ancient jurists, belonging to the Italian-French school of private international law, have divided the local laws, or "statutes" in contrast with the Roman law as a universal common law, into three categories. The local laws could be "personal", "real" or "mixed" statutes. They were called *personal* when their unique or principal aim was a rule relating to persons; they were called *real* when their unique or principal aim was a thing, and they were called *mixed* when the aim was a mixture of persons and

things(?) or, as such a mixture was a nonsense, *an act performed by persons with relation to things*. The old celebrated and as an historical event weighty doctrine, had established, in order to decide the conflicts of laws, one rule for personal statutes, a second for real, and a third for mixed statutes. The doctrine gave no rule for the juridical relation, and this lack is certainly the main cause of its decline. The doctrine, moreover, has met with a strong opposition in the Netherlands, particularly in the works of JOHN VOET and HUBER, whose names are well known in the anglo-american juridical world. It has never been received in England. In our days the old doctrine is dead, although it is not buried; its nomenclature, sometimes, haunts modern works. As a mitigating circumstance, it must be said that the doctrine, as an indirect result of its shortcoming, has contributed to fix the attention of later jurists on the juridical relation.

The juridical relation in the doctrines of later jurists. With utmost reverence I call upon SAVIGNY as a witness and I quote his celebrated golden rule:

> "for each juridical relation we ought tot go in scarch of the juridical domain, to which it belongs according to its peculiar nature, and to the civil law to which it is subjected in consequence."

According to my opinion, this rule is the dawn of the modern evolution of private international law. I have been called, by a benevolent critic — he was too benevolent, I should think — *the best* disciple of SAVIGNY. I accept the qualification of a disciple, but I do not belong to the adherents for whom the "*αὐτὸς ἔφα*" is an argument. But here it is not my task to criticize, it is quite sufficient to point out, that the master's formula is *based on the juridical relation.* This is also the case with many modern systems. The doctrine which is based on the respectation of regularly acquired rights, supposes that it is possible to determine, before applying the fundamental rule, when a right, derived from a juricical relation, is a regularly acquired right. *Mutatis mutandis*, we find the same basis for the theory of the *personal autonomy*, as a theory granting to the persons the faculty of freely chosing the law to which a juridical relation between them is to be subjected.

The juridical relation in my system. I revere the illustrious scientists my predecessors, but I maintain that the solution of the so-called conflicts of laws is not the only aim of private international law. The fundamental rule of private international law, according to my opinion, is the following one. Every State, even when it is acting in isolation, is bound to recognize, as a source of a duty correlative to a right, every juridical relation established in conformity with the requirements of the reasonable order of international social life. This obligation of the State will last as long as the relation is not extinguished in conformity with the same requirements. The same obligation is, of course, also imposed upon the collectivity of the States. In consequence it may be said, that it is perfectly reasonable to submit a juridical relation to the civil law of the local sphere of social life, to which it belongs in accordance with its peculiar nature, provided that the relation belongs to such a local sphere. If it does not belong to such a local sphere, — a possible state of things, to be taken into consideration — the juridical relation is submitted to the international-common rules of law if these are to be found, and when they are not, to the reasonable principles of international social life, as a subsidiary source of positive law. I must confess frankly that the international-common rules and the reasonable principles, the latter being considered as a subsidiary positive law, do not give the world a great certainty as to the applicable rule, but the way out is by no means the establishment of mechanical rules for the solution of the so-called conflicts of laws, *it is the interference of unions of States and, in the last resort, of the collectivity of the States.* The State, acting in isolation, cannot give the world the uniformity of the juridical rules, whilst the collectivity is in possession of the full power of mankind on the human species.

Division of the subject-matter. With regard to the juridical relation, the universal science of jurisprudence is in possession of many data, but positive law has only few, and therefore a comparative study of the national laws would not be useful. But the conception of the juridical relation may be analysed, and its elements are a good object of investigation. I am thinking of the *subject*, the *substance-*

matter, the *formation* and the *dissolution* of the juridical relation. I hope to be able to make clear that the juridical relation is really she spine of private international law. My general investigations will be succint here, but the subject-matters of the following sections will be, if I may call it so, the limbs attached to the spine.

§ 40. *Subjects of juridical Relations.*

Delineation and division. Here I shall only deal with persons, considered as subjects or juridical relations. To the rights of persons the following section will be devoted. The conception of the person belongs to the universal science of jurisprudence, and the distinction made between natural persons and corporations — or juridical persons- also belongs there.

Natural persons as subjects of juridical relations. According to the reasonable principles, every human being may be the subject of a juridical relation. This capacity begins at the moment of birth, with retrospective effect to the time of impregnation in so far as such an effect is advantageous to the infant; it ends at the moment of death. The conceptions of birth, impregnation and death belong to the universal science of jurisprudence. With regard to the impregnation, there are, within natural limits of course, some disparities in the national laws; these are particularly important in the hereditary law and they will be discussed in the XVIth section, together with some questions connected with birth and death, as juridical facts. The legal rules relating to the status of a person whose death is probable but not ascertained, have a natural basis; the positive laws are sometimes at variance. As to the capacity of being the subject of a juridical relation, it must be noticed that a State, according to the principles, is undoubtedly entitled to a regulation of *the use of the said capacity*, and that such a regulation may limit the power personally to enter in juridical relations, to modify such relations or to dissolve them, but that the State would exceed the limits of its sovereignty on man, if it absolutely deprived a living man of the right

to be the subject of juridical relations. Mankind, by such a rule would even exceed its reasonable sovereignty on the human species. Positive law, however, is inclined to grant the State an absolute and unlimited sovereignty, and therefore, not exclusively in barbarous times, we find regulations admitting slavery or the legal fiction of death as an accessory of punishments. We even find fundamental rules depriving aliens in principle of "civil rights" in general. Such legal institutions are without any reasonable foundation; they are on the verge of disappearing. In any case whenever they exist in the law of a State, it must be emphasized that other States are not bound to collaborate with the former, and to consider the ill-treated person unqualified to be a subject of juridical relations. In the juridical manuals we often read that foreign laws admitting slavery, fictive death as accessory of a penalty etc. are adverse to public policy, and that as such they are deprived of any legal effect in other States. I prefer the above-mentioned explanation, which is based on the absence of a duty of collaboration of the other States. My explanation makes it possible to avoid the expression "public policy", a very vague one in our matter, and also to avoid the consequence, which generally follows, that foreign laws are *without any legal effect*. I consider it entirely justified that a State, the duty of collaboration of which in founded on reasonable principles, refuses to collaborate with a State depriving a man of his personal sovereignty. The ill-treated person will also be treated as a being capable to be a subject of juridical relations, but if his fictive death, in his own fatherland, has entitled his legal heirs to his estate, and if somebody has regularly acquired goods belonging to the estate from the heirs, the acquired right is not necessarily without any legal effect. I hope the reader will believe that I am not an enemy of "public policy" but I am not a friend of the doctrine in which the said expression is warp and woof. I am indicating it here, but I wish to add that we shall meet with "public policy" in a great part of this system, especially in connection with the principle, called the principle of nationality in the private international law. I hope to show that, by means of the said vague expression, the effect of which is very much like that of

a magic expression, many things can be done, *sometimes even reasonable things*. The last acknowledgment is an attenuating circumstance, but no more.

Corporations, or juridical persons. A very old doctrine, hardened by age, maintains that corporations or juridical persons — let us say juridical subjects not being men of flesh and blood — are fictions created by a State. The State, in its absolute and unlimited sovereignty, could, according to the doctrine, rise to the rank of a juridical subject a stone or anything else. The result of the doctrine is, that the juridical effects of the fiction are limited to the territory of the State, the sovereignty of which has been active, and that for the other States the creation is what it is really, a stone perhaps, but not a juridical subject. This idea of a fiction is, according to my opinion, adverse to the reasonable principles. A man unites his social activity with that of his fellowmen, because an isolated life is not worth living. Therefore an association of men is, according to the principles, a juridical subject, whose capacity ought, as a rule, to be recognized, provided that the three following conditions are fulfilled. The association must have an aim, which is advantageous to Society, an organization which enables it to act as a subject of juridical relations, and means of action adapted to its aim. Positive law, however, is strongly influenced by the fiction-doctrine. Especially when the State is dealing with so-called "foreign" corporations, many economical and political considerations are obstructing the way of the evolution. I hope to show however, in the section devoted to the rights of persons, that the germs of an evolution are visible. The influence which THE WAR will probably have, will be discussed in the same section.

§ 41. *The Substance-matter of juridical Relations.*

Analysis of the conception and general lines of a division. As has been pointed out in § 39, there are to be found a duty and a corresponding claim, in a juridical relation. The combination of duty and claim is the substance-matter of the juridical relation, and I

shall use the said conception in order to divide my matter methodically. The right, correlative to the duty involved in a juridical relation, may concern the persons or their goods; in the first case we have to deal with a personal right, in the second with a patrimonial one. The duty may be imposed on the other juridical subjects in general, or only on one of several definite subjects, the correlative right is, in the first case, an absolute one, in the second, a relative one. There are really no mixed rights, but two juridical relations, one of which is personal and the other patrimonial, may very well exist on the same basis, and an encroachment upon an absolute right may create a personal right tending to indemnification. It is my intention to discuss succintly the abovementioned various kinds of rights in this paragraph, and to refer, for particulars, to the other sections of this part of my system. It seems evident that the distinction between the various rights influences the formation and the dissolution of juridical relations.

Absolute personal rights. Every man is a sovereign over his own personality, including life, honor, freedom, moral and physical health and his economical value as a labourer. It is only for the sake of the Law, i.e. the reasonable order of social life, that mankind and its representative the State are entitled to encroach upon the personal sovereignty. Consequently, every man must be obliged to respect the personal sovereignty of his fellow-man, and any violation of this sovereignty grants to a person a claim against the trespasser, which tends to the recovering of the violated right and, as a rule, also to indemnification.

Relative personal rights. Their domain is the law of family-relations, the expression to be taken in its broadest sense. It is sufficient to point out here that family-relations, established in conformity with the requirements of the reasonable order of social life, must be recognized, as a source of personal rights, by every State and by the collectivity of the States. The great dispute between the principle of nationality and the principle of domicile, in the domain of the family-law, is really about the question when a family-relation must be considered as established in conformity with the above-mentioned

requirements. The XII[th] section, contains a discussion on family-relations.

Absolute patrimonial rights. Here the principal right is the right of the owner. With regard to this right and to the other rights, in so far as both are relating to corporeal goods, the distinction between immovables and movables is still of importance in our days. But there are absolute patrimonial rights relating to incorporeal goods, as for instance copyright or the right of the inventor. Such rights are absolute, in so far as everybody is bound to respect them and as they may also constitute a part of the fortune of an individual. They are also patrimonial rights. In a methodic classification of the civil jurisprudence, their place is the same as that of the general right of ownership. I am aware of the fact, that the nature of "intellectual ownership" is an object of dispute, but, whatever that nature may be, these rights have international sides which deserve an investigation.

Relative patrimonial rights. Their domain is the law of the obligations, of which the law of contracts is a part. I shall deal with it in the XIV[th] section. Here I only mention that the right to claim the performance of an obligation may be, on one hand, an incorporeal or immaterial part of a man's fortune, and together, when it is "incorporated" in a negotiable instrument, also a corporeal or material part of the same fortune. This ambiguous nature is also a matter of scientific disputes, the international side of which will be dealt with in the §§ 57 and 60.

§ 42. *The Formation of juridical Relations.*

General thoughts. In the universal jurisprudence the primordial source of juridical relations is the *juridical fact*, the state of things to which the law attaches a duty with a correlative right. The juridical fact is such a remote source that, very generally, the lawgivers have not seen the necessity of bringing it under positive rules. A species of the juridical facts, the most important one in jurisprudence, is the *juridical act*, viz. the act performed by one or several juridical

subjects, with the aim of establishing a juridical relation, and to which such an effect has been attached by the law. In the positive laws, there are rules relating to juridical acts, but only some aspects of them have been taken into consideration by the lawgivers. A species of the juridical acts, and this is again the most important species, is the *juridical agreement or contract*, the concordance of the perceptible expression of the will of two or more subjects, who are acting with the aim of producing, modifying or dissolving a juridical relation. Many rules relating to contracts are to be found in the positive laws the gist of the conception may even be considered as belonging to the international-common law.

Juridical facts. They are modifications of the state of things in social life, to which Society attaches a duty connected with a claim, for instance a prejudicial act or tort injustly performed by an accountable subject. Very often the high principle only has been confirmed by the international-common law, every qualification of the act is expressed in a different way in the national laws, and these laws are also at variance with regard to the subject charged with the duty and the subject entitled to the claim, or with regard to the extension of the duty. Such differences could be removed by the collectivity of the States, the State in isolation can only come to a relatively reasonable solution. The way to come to such a solution, is the *localization* of the fact, the analysis of the link that may exist, in a social sense, between the fact and a local sphere of social life. If such a link, strong in a social sense, is to be ascertained, the positive law, in force in the said local sphere, must be applied to the qualifications of the fact and to its juridical effects. If localization is impossible, because reasonably there is no link or no strong link between a local sphere and the fact, as the latter really belongs to international or rather to universal social life, the judge, acting as the agent of an isolated State, will have to apply the rules of the international-common law to the act, or, by default, the reasonable principles of international social life. Only the collectivity of the States is able to go further. The principle of localization, mentioned above, is not the solution of a conflict of laws, in the classical sense, it is a guiding thought, as exten-

sible in its application, as social life itself. The local sphere, to which a fact belongs reasonably, is not always the sphere in which a material modification of the state of things took place.

Juridical acts. The principle of localization is applicable here, as the juridical act is a variety of the juridical fact. But here the matter is much more intricate than that of the foregoing rubric. We have to deal here with a juridical subject, interfering on purpose with the state of things. The subject is acting personally or by means of a representative, and, apart from the power of representation, the status and the capacity of the subject are implicated in the matter. The jurisdiction, the power of finding and fixing the law in the matter and of enforcing the claim, is also a thing of peculiar importance here, and it may be that according to the law of the country, where the claim which comes from the act is introduced before a Court, the duty, the compulsory performance of which is required, is not enforceable. I shall come back to the various points, mentioned above, especially to the status and capacity of persons, in the XIth section. A question which has been connected in jurisprudence with the juridical act since immemorial times is the question of the form of the act. The antique maxim:

"Locus regit actum"

is well known. When it is expressed in latin, and the word "regit" is not translated, the rule is apparently a settled rule of international customary law, but the exact sense of "regit" is a matter of dispute. There are two opposite opinions. The supporters of the first opinion give the rule an *imperative* effect, so that the form of an act must be exclusively the legal form of the country where the act is performed; according to the second opinion the rule is a *facultative* one, the legal forms of the *locus actûs* are sufficient, but the forms of the law, considered as governing the substance-matter of the juridical act, are also sufficient. The latter opinion is, according to my view, in conformity with the principles, but in a country, where the rule "*Locus regit actum*" is a part of the positive law, it is not always possible to construct it as a *facultative* rule. The jurisdiction has been discussed in § 35. Besides, I have pointed out above, that it may be that in the

country, the courts and judges of which have jurisdiction for a claim, the duty corresponding to the claim is not enforceable. In such a case, the claim cannot be enforced in that country. If, after having ascertained that such is the sense of a local law, one would say that the non-enforceable right is contrary to the "public policy" i.e. to the *local opinion about public policy*, there would be no other objection than that the qualification is unnecessary and only a source of misunderstanding. The personal duties of husband and wife, for instance, may not be fit for a compulsory performance, according to the law of the State where such a performance is the object of a claim.

Juridical agreements or contracts. In the universal science of jurisprudence an agreement is not only a source of obligations, although its main importance is to create obligatory relations. The contract is a species of the juridical act, and the principle of localization is applicable to contracts, as will be discussed sufficiently in the XIV[th] section. I have only to emphasize here that the localization of a contract is a matter which requires a thorough analysis of its social aim, and that the place where the contract was concluded or the place where it must be performed are real elements, which may be used as means of localization, but that neither the *locus actús* nor the *locus executionis* are circumstances, which will always and mechanically lead to a localization. This restriction is the main difference between the principle of localization and the classical rules for the solution of the conflicts between the national laws, relating to contracts.

§ 43. *The Dissolution of juridical Relations.*

General views. There is, according to international common law, a logical link between the establishment of a juridical relation and its dissolution. It is quite natural that a knot should be untied by means of an inverse repetition of the manipulations, by which the knot was made. In this way, death will dissolve a relation which was established for life, time will untie a temporary link, and the performance of a duty will make an end to the claim demanding its

performance. In the same way a new agreement may dissolve the relation created by a former agreement. But it would be unreasonable to deduct from the above mentioned undeniable logical effects a mechanical rule, purporting that the law, governing the establishment of a juridical relation, must also govern its dissolution. It is only true that, when a juridical relation is localized and submitted to a local law, and the same law also dissolves it, the dissolution has to be admitted in other countries, provided that the localization has remained unchanged. The last restriction prevents a mechanical construction of the rule. We shall often have the opportunity to apply the rule, with its restriction, to the family law, the law of goods and the law of obligations. The change of a man's nationality or domicile, or of the situation of a movable good may for instance be influential on the dissolution of juridical relations connected with the person or the good. In the present paragraph I shall only apply the same rule, always with its restriction, to one manner of dissolution, viz. to the *legal limitation* of actions. It is certainly a matter, the difficulty of which has often been emphasized. I am only thinking of the limitation, the effect of which is to dissolve or to paralyze a right of action; other effects of the course of time on a duty or on a right are out of discussion. The restriction of my endeavours to a definite matter will enable me to delineate the size and the measure of an impediment on the way of the evolution.

Legal limitation of actions. The question whether limitation has a dissolving or only a paralyzing effect belongs to the universal science, and I shall not discuss it. The reasonable foundation of legal limitation cannot be denied; actions, the origin of which is only to be found in a remote past, are to be barred in the interest of social order. But the particulars of the legal institution, the length of time, the causes of interruption or of suspension of the effect etc. are positive data, about which the national laws are at variance. As long as this will be the case, a State, acting in isolation, will be unable to do more than to refer to a law, as to legal particularities. Many and many able scientists have tried to establish a supernational rule referring to a law about the particulars of legal limi-

tation, from the point of view of a State acting in isolation, or from the point of view of the courts and judges of such a State. Generally speaking, there are two opposite views. According to some authors, limitation is governed by the law of the country in which the court is sitting, the *lex fori* according to the shorter latin expression; the supporters of the opposite view maintain that limitation, as a manner in which a juridical relation is dissolved or paralyzed, ought to be submitted to the law governing that juridical relation, or to use another short latin expression, to the *lex obligationis*. I beg to say that both views are sound to a certain extent. When a juridical relation is localized, and the law of the local sphere to which it belongs, i. e. the law governing the relation according to reasonable principles, has dissolved or paralized it after a certain time, there is no reason why the claim, founded on the same law, should be enforced. On the other hand, when a claimant appeals before a judge to a juridical relation, established in another country than the country in which the judge is sitting, the latter must, as a rule, have jurisdiction for the claim, and then it is not unreasonable to deduce from this jurisdiction the conclusion, that the *lex fori*, the basis of the jurisdiction, will govern the limitation, as a matter in which the local social order is concerned. The combination of both considerations is that the action will be dissolved, or paralyzed, when this effect is attached to it, either by the *lex obligationis*, or by the *lex fori*. Such a solution is only relatively reasonable, and it will be positively unsatisfactory for the international intercourse, as long as the States will exceedingly extend the jurisdiction of their own courts and judges. With regard to juridical relations, which often occur in international social life and which are of very great importance in that life, *uniformity as to the legal particulars of the limitation is the only absolutely reasonable solution.* The collectivity of the States is perfectly able to attain such a solution. The Bern treaty, relating to the international carriage of goods on railways, contains regulations, which at least equalize the length of the limitation time. In the conferences of the Hague in which a treaty relating to bills of exchange has been elaborated, regulations of the same nature have been inserted in the draft of the treaty.

Eleventh Section.

THE LAW OF PERSONS.

§ 44. *Juridical Links between a Person and the Territory of a State.*

General remark. I maintain, of course, the distinction already made, with regard to the subjects of juridical relations, between natural persons and corporations. But I shall, in the beginning of my argumentation, concentrate my efforts on the natural persons, and after having elucidated that point, I shall investigate in how far the data, relating to natural persons, have to be transformed with regard to corporations.

Nationality. I refer, in general, to § 4. In the domain of public international law, nationality is the basis of many duties charged on individuals and of many rights granted to them, but many able and illustrious scientists are of opinion, that nationality is also a predominant element in the domain of private international law, and that a man has to be submitted, as a rule, but not without several exceptions, to the civil laws of the State, a citizen or subject of which he is. Such a rule is called in private international law, *the principle of nationality*, a principle which very often, is being opposed to the *principle of domicile*. The said PRINCIPLE OF NATIONALITY is generally considered, by the italian-french authors, as a universal or supernational rule, of a higher rank than the laws of the States, because it is destined to solve the conflicts of these laws. The basis of the exceptions to the principle of nationality or, in so far as the term "exception" is rejected, the basis of the limitations of the principle of nationality, is also a universal or supernational principle, parallel with the principle of nationality, the PRINCIPLE OF PUBLIC POLICY. According to the supporters of the above-mentioned doctrine, the fundamental rule, embracing both principles, is that every man is to be considered everywhere as submitted, especially with regard to his status and capacity, to the civil law of his fatherland, provided that when this national law is considered abroad as adverse to public policy, it is disregarded. Sometimes the terminology is used of many centuries ago, and a man's

national law is called HIS PERSONAL STATUTE. Nationality, as the basis of private international law, is not necessarily dependent on the same conditions as nationality does in the domain of public international law, but the admission of two kinds of nationality, a private and a public one, would accentuate the discrepancy between nationality, considered as a feeling, and nationality as a juridical qualification, so that in a State there is generally only one conception of nationality, depending on fixed juridical marks. The difficulties relating to the determination of a man's nationality and to the proof, difficulties which have been mentioned in the discussion of nationality with regard to public international law in § 4, are also to be found in private international law. They are even greater in the latter, as it may often be necessary to give evidence of the real nationality of another man, who is denying it. It is clear, finally, that when a man is without any nationality, the law governing his status and capacity must be another law than his national law, viz. the law of his domicile or even of his abode.

Domicile. Domicile is undoubtedly a point of juridical contact between a man and a State. I wish to point out, with my usual liberty op speech, that it is a sign of passion to call the link of the domicile a link of subjection and slavery, in contradistinction with the link of nationality, which is called a link of dignity and liberty. It is better to abstain from giving names to an opponent, the more so as a man will choose his HOME with infinitely more liberty than the place of his birth, his blood or the colour of his skin. I wish to remain objective. I must confess frankly, moreover, that the conception of the domicile, as the basis of status and capacity, raises difficulties as great as those attached to nationality. The main difficulty is the discrepancy between the English conception of domicile and the continental-european one; incidental difficulties may arise with regard to the *legal* domicile and to the *elective or fictive* one. The lasting domicile of the English, and to a certain extent also of the American Law, presupposes the intention to found a home unconditionally and with a permanent intention. We are acquainted with this notion by the works of DICEY, WESTLAKE, FOOTE, and others, and by the cases quoted by these learned men. This notion seems to be very near to an

elective civil nationality. The domicile, in the sense of the continental laws, is also fixed *corpore at animo* but the *animus* is only directed towards a centre of social life, and not towards a permanent home. The legal domicile of married women, wards and lunatics — I apologize to the ladies for the legal combination — is more a matter of competency, or perhaps of jurisdiction, than a basis for status or capacity. There are scientists, however, who support here the principle of nationality and who affirm, that the legal domicile of a person is to be determined by his national law. The elective or fictive domicile is certainly a domicile connected with juridiction; it ought not to modify a person's status on capacity.

Simple abode or stay. This is by no means so strong a link as the national or domiciliary one, but it must not be neglected. A man sojourning or staying in a country, is to a certain extent a *subjectus temporarius*, according to the saying of GROTIUS and HUBER, he is subjected to the local law in the proportion of his penetration into the local social life. This is not only important with regard to criminal offences and to torts, but also with regard to civil laws, even to status and capacity. The penetration into the local sphere of social life may have the consequence, that a person's appeal to his national or domiciliary law will be disregarded by the local courts.

Participation in the local life, without even residence or stay. An alien, domiciliated abroad, may take part in the local social life, by means of a representative or agent, even by a letter or by telegrafic or telefonic communication. This penetration into the local sphere of social life is not very deep, and the influence of the local laws on such a person is in proportion to that depth.

The links between a corporation and a State. The links, which may exist between a natural person and a State, do not appear in exactly the same manner in corporations, but there may be analogical relations. A corporation may be so closely connected with a State that it may be given the qualification of a *"national"* corporation, although in a peculiar sense. Three links are the elements of such close relation: the place of formation, the seat of the directing board, and the centre of the affairs. It is plain that the business-centre

may be in one State, whilst the place of formation and the seat of the board are in another. The business-centre, in such a case, nearly approaches the idea of a domicile. A corporation may have a secondary seat, which is assimilable to a sojourn or stay, in a country, and it may finally only take part in the local business-life, even without a secundary seat or branch-establishment. The juridical status of corporations, in private international law, will be discussed in § 46.

§ 45. *Status and Capacity of natural Persons.*

Preliminary remarks. Many subdivisions on which the person's status depends, are to be found in the laws of the various States. Some of these subdivisions are natural, e.g. the distinction between men and women, on which neither nationality nor domicile have the slightest influence, or the distinction between infants and adults, considered independently of a certain age, and that between sane persons and lunatics, apart from an official statement of the disturbance. Other distinctions are statutory ones, for instance those deriving from marriage, legitimacy or adoption. This is also the case with regard to the capacity to create, to change or to dissolve juridical relations. Some incapacities are natural, as those of very young children and manifest lunatics, others are statutory as for instance those of married women in some laws. It is clear that in so far as the laws are divergent, at least as to the statutory elements of status or capacity, a State, acting in isolation, is by no means able to equalize the laws. It is obliged to be satisfied with only a relative solution viz. the reference to a law. Since immemorial times the scientists have tried to indicate the law governing the status and capacity of a person, i. e. his *personal law* from the point of view of a State acting in isolation. This expression, the personal law, is in so far neutral that it does not decide whether nationality, lasting domicile or ordinary domicile are decisive. When further, in this system, I shall have to indicate the law which, *according to the rule laid down by a State acting in isolation*, governs the status and the capacity of a man, I will say that such a State applies the *personal law* of such a man. I use this expression, as it is a neutral one, in the struggle between nationality and domicile.

I do it only for the sake of brevity. I could have used, in the same sense, the expression "personal statute" but I want to avoid that ambiguous expression. The more so because, unlike many of my predecessors, I am not in search of a supernational rule for the solution of the conflicts of laws, but only of a guiding thought. It is my intention to grant in international social life, to nationality, lasting domicile, ordinary domicile, sojourn and participation in a local business-life, the influence each of these points of juridical contact between a man and a country deserves.

Absolutely and relatively reasonable principles. It is the general guiding thought that a man ought to be subjected to the civil law, in force in a local sphere of social life, *in proportion of his penetration into such a sphere.* According to this thought an absolutely reasonable rule could easily be found, if the divergences between the various laws, with regard to persons, were only founded on the differences of the local social life. Every man would then, as a rule, be subjected to the law of the local sphere of social life in which he has settled, unconditionally and durably, *cum animo perpetuitatis.* The reference to this domiciliary law would by no means be a mechanical and supernational rule for the solution of conflicts between laws, but only a guiding thought, allowing the other points of contact the influence they deserve. But an evolution in the direction of the absolutely reasonable principle meets with a formidable impediment. Many lawgivers, moved by religious or social-philosophical considerrations, have such a high idea of their own absolute and unlimited sovereignty, that they regard themselves entitled to impress the rules of their own laws on their own subjects as an indelible mark. On this basis, the said lawgivers are logically coming to the conclusion, that they are also entitled to prevent any evasion of their national laws by their own subjects, even when these subjects have established their home abroad, *cum animo perpetuitatis.* Such an evasion is sometimes qualified as a FRAUD. The protection to be granted to citizens, living abroad, is also an inducement to the application of the national law on these citizens, from the individual point of view of a State and within the sphere of its power. In consequence of the above-

mentioned considerations, many States consider the principle of nationality as the relatively reasonable principle, *at least as to their own citizens, residing abroad.*

The spirit of the positive laws. I only mention in passing the data of the Roman law and of the first centuries after the fall of the western Roman empire. The germs of the principle of nationality can be found in this old history. In many countries however, and especially when several civil legislations were in force simultaneously in a country, with geographical limits, the principle of domicile became predominant. The same cause has had the same effect in colonial empires. In modern times, under the influence of the codification and the desire to establish the unity of national civil law, the principle of nationality prevailed in many States. But not everywhere. I beg to remind the reader of what I have said in the preliminary remarks made in the beginning of the present paragraph, with regard to the expression "personal law". The States do not agree as to the personal law of a man, and a formidable impediment obstructs the way of the evolution in the direction of the absolutely reasonable principle. Even if all the States were represented at a conference, and would try to come to a solution, *without equalizing the laws as to the main points,* the above-mentioned impediment would most probably prevent the conclusion of an agreement on the basis of the lasting domicile. We may add that, *a fortiori,* an agreement on the basis of the simple domicile would be impossible. But a practical summing-up of the matter can be made. If an agreement on the basis of domicile is as yet unattainable, the only way to obtain at least the unification of the meaning of the expression "personal law of a man" would be the admission of the principle of nationality as a *temporary provision.*

The germs of an evolution. The results of the Hague conferences for the codification of private international law may be considered as a beginning. The treaties, elaborated in the conferences, are founded on the principle of nationality, with several exceptions. I shall often refer to this point. Besides, I dare say that a victory of the principle of nationality will be the beginning of the consciousness of the shortcomings of the said principle. It is easy to understand that the prin-

ciple of nationality may be satisfactory as to citizens residing abroad, but that it is less satisfactory, when aliens, forming a quasi-autonomous colony in the interior are concerned. This last circumstance is an inducement to an evolution. Two currents, perceptible in the devolopment of private international law, are running in the direction of the evolution. I resist their influence personally, but I shall try to measure their force. The first of these currents is the so-called system of the "renvoi" or "pointing back", of which a man as WESTLAKE is an adherer, the second is the doctrine of public policy. The "renvoi" will allow an application of the principle of domicile, if a man's national law points back to it. Such a pointing-back of one law to another will allow the judge to make halt *there where it is in casu reasonable to make a stop.* And with regard to the doctrine of "public policy" the vagueness of the expression grants it such an elasticity that it may be sometimes used to *reasonably limit the principle of nationality.*

§ 46. *The juridical Status of Corporations, in private international Law.*

The various points of juridical contact and the reasonable principles. I beg first to refer to § 44. It has often been said, that a *corporation has a nationality.* This is only partly true. It *may be* that a corporation is so closely connected with the local social life in a State, that it may be considered, *in a peculiar sense,* as a *national* corporation. But such a nationality is quite different from that of a being of flesh and blood, so that it is wrong to draw the conclusion that the consequences, deriving from the nationality of a natural person with regard to status and capacity, should also be deduced from the peculiar nationality of a corporation. To prevent misunderstanding I must point out that the adjective "national" attached to a corporation, may have three different meanings, a purely political one, an economical-political one and a purely juridical one. In a political sense, a corporation has the nationality of the State of which it appears to be an organ. Public corporations as provinces or muni-

cipalities, have such a nationality. In an economical-political sense a corporation has the nationality of a State, *whose economical and political interests it is serving.* When in martial politics it may be necessary to make a distinction between a friendly and a hostile corporation, the feelings of its directing board are taken into consideration. In the domain of private international law, so in a purely juridical sense, a corporation may be said to possess the nationality of the State in whose local sphere of social life its activity is focussed or concentrated, viz. in the sphere of which are the *place of its formation, the seat of its board and the centre of its business.* This presupposes three juridical points of contact. Besides, I wish to observe, that such a nationality might as well be called a lasting domicile. It is only in the case that these three points of juridical contact are to be found in the same State, that the nationality of that State can be granted to a corporation, and such a qualification, moreover, is nothing else but a guiding thought so that the possibility, that such a "national" corporation may have penetrated to a certain depth into the local life of another State than its "fatherland", must be taken into account. Let us see what the juridical status of a corporation may be, when the three mentioned points of contact are not focussed in the same State. Casuistics must be avoided, the phenomena of life must be observed in life itself. The imagination may conceive cases, in which the three points of contact might be found in three different States, but that is too unusual. Quite practical, on the contrary, is the case of a corporation, the formation of which has taken place in the State in which the seat of the board is also established, but the centre of business of which — a railway, a mine or a plantation — is situated in a different State. In such a case there is properly speaking *neither nationality nor domicile*, but the juridical status of the corporation is, according to reasonable principles, to be governed by the law of both States, in proportion of the penetration of the corporation into the local sphere of the social life of each State. This is not one of the classical rules which mechanically solves a conflict of laws by means of a reference to one of the laws, it is, according to the repeatedly used comparison, a guiding rope, but it does not take

away the exertion of the march. The particulars of each case separately must be investigated. Questions connected with the formation and the internal affairs of the corporation will, in this way, be submitted, by preference, to the law of the State where is the place of formation and the seat of the board, and questions relating to the external sphere of business, to the law of the State where the business-centre is situated. If the corporation has, in a third State, a branch-establishment, or simply if it takes part in the local business-life of a third State, it will be subjected to the laws of that State in proportion of its penetration into the local social life, which practically means a slight proportion.

Positive law and its evolution. In § 40 I have discussed the question whether a "foreign" corporation is to be recognized as an existing juridical subject. I beg to observe here that, in spite of the rigorous doctrine of the fictive personality, positive law is evoluating in the direction of the reasonable rule. A State, which would logically apply the fiction-doctrine, and, in consequence generally deny "foreign" corporations the quality of an existing juridical subject, would act so distinctly in contrariety to the requirements of the reasonable order of international life, that such a State would shrink from the logical consequences of its own system. So we see that the practice is really trying to escape such consequences. Sometimes an appeal is made to comity, an attempt to construct an international and more liberal custom is undertaken, or even an unavoidable requirement of the juridical security of the international intercourse is admitted, but on one ground or on another, the fiction is put aside and foreign public or private corporations — companies, for instance — are recognized as juridical subjects. I cannot withdraw the remark that the appeal to an unavoidable requirement of the juridical security of the international intercourse is a latent homage to what I call "the reasonable principles". International treaties, purporting the reciprocal recognition of corporations and companies, have been concluded, but such treaties are only a consequence of the desire to have the recognition in black on white. With regard to associations, founded by individuals with another aim than trade, navigation etc., the evolution of positive

law is not much advanced: such associations do not participate in the international social life with the same intensity as commercial companies do. In positive law, the difficulties, connected with foreign corporations are not yet at an end when the question of their recognition as juridical subjects is solved. After this solution a new difficulty arises, viz. the juridical status of such corporations. The practice of positive law very often appeals to the principle of nationality. Scientists affirm that a corporation has a "personal law" — or even a personal statute — as well as an individual, and that the decisive element of this personal law is nationality. The practical consequences of the principle of nationality are here, in the first place, that each corporation must have a nationality, and, in the second place, that there must be a fixed distinctive mark of such a nationality. With regard to such a mark the authors do not agree. Sometimes the place of formation is considered as decisive, but the scientific dispute generally runs on the competition between the "social seat" and the "centre of the undertaking". The international case-law might in the end, lead, if not to a reasonable rule, at least to a fixed international custom. It is very probable, moreover, that THE WAR will be influential on our subje ct-matter. Foreign corporations and especially foreign companies will not be regarded favourably and it may be that "nationality" *in the economical-political sense*, will be considered as the predominant point.

Twelfth Section.

FAMILY LAW.

§. 47. *General Views.*

The conception of family law. The denomination "family law" is taken here in a broad sense, including social protection of infants, lunatics, etc. who may be without any family relations. Society, in such a case, is a broad family. I speak of "society", and not of "nation" in order to prevent the interpretation that I should only have the political link of nationality in view.

A glance at history. A glance will do. Family law, among all the nations, has a common natural basis, but the positive laws of the nations have been framed in a very different manner, under the influence of religion, immemorial customs and social philosophy. Each nation shows a *spirit of obstinate conservatism*, with regard to the national family law, which is generally considered as a valuable common good of the nation. This spirit is especially apparent with regard to marriage. I refer to § 25 as to the relation of marriage-laws with population. Equalization of the national marriage laws seems unattainable. With regard to the legal status of a married woman and of legitimate or illegitimate childern, the impediments are almost equally great. We shall also see that there is a close connection between the national conservatism and the principle of nationality. In theory the collectivity of the States could perfectly equalize the national laws, but in practice it is scarcely possible, and as long as this will be the case, even the collectivity can only obtain a relatively reasonable result.

Division of the subject-matter. The three main parts are "marriage", "procreation" and "protection of infants and similar individuals", but, for the sake of a methodical investigation, I have divided "marriage" and assigned three paragraphs to it.

§ 48 *Solemnization of Marriage.*

The conditions imposed on a future husband and a future wife. I consider solemnization, viz. the interference of an official, as the normal form and I disregard, as exceptions, which, besides, are on the verge of disappearing, the marriage concluded by private agreement, even when the latter is a serious one, purporting a union for life. I beg to add that I am not writing a monography, and that no reference will be found here by the Englisch reader, either to Gretna-Green or Dumfries marriages, nor to *Sotomayor v. De Barros* or other remarkable cases. Even the promise of marriage, a subject discussed in my work on the international law of obligations, will be left aside. My starting-point, in the present rubric, is that an official interference is

needed for the conclusion of a lawful marriage, and that the said interference depends on preventive conditions. It seems better to speak of "conditions" than of "capacity", in order to prevent a simple application of § 45 to the matter, although my conclusion will be nearly the same as that of the quoted paragraph. If the differences between the national laws, with regard to the conditions of the solemnization, could be reduced to a few variegations, connected with the local social life, an absolute reasonable rule could be established. Every State would be entitled to impose the conditions, connected with the social life is its own realm, on every man, whose lasting domicile would be in that realm. The fulfilment of these conditions would be necessary and it would be sufficient. But as long as the national laws will remain what they are, such a simple general rule will not answer to the obstinate conservatism of the States. Many States will on one side strongly object to a rule, allowing their own subjects to evade the legal conditions of their fatherland by means of the establishment of a domicile abroad, even of a lasting one. This consideration leads directly to the well-known principle of nationality, *at least with regard to the own subjects*. On the other side, the same tenacious clinging to national wisdom will prevent the State from the application of a rule, according to which the fulfilment of the conditions, enacted by a foreign law, would be sufficient with respect to aliens, desirous to be married in its realm. This consideration leads, directly, to the proviso based on the local conception of "public policy". It is obvious that, if the principle of the domicile established *cum animo perpetuitatis* cannot be the basis of a general international agreement, such an agreement is a fortiori almost impossible on the basis of the ordinary domicile or on the basis of the application of the law of the country in which the marriage is to be concluded. The Hague treaty, relating to marriage, contains the germs of an evolution. Its basis is the principle of nationality, but there are a few restrictions. The first is the admission, with regard to the so-called "capacity" to marry, of the "pointing-back doctrine", in so far as the national law of a person may point back to the law of the domicile of the same person, in which case the latter is applied without further "pointing back". The second restriction enables the State absolutely to impose

some fixed conditions of its own law on aliens, who intend to conclude a marriage in its realm; the denomination of public policy has been intentionally avoided in the treaty. I beg to refer modestly to my former observation, as to the opportunity, sometimes granted by objectionable doctrines, to evoluate in the good direction. "Understanding" in this matter, is not "approving", it is simply unterstanding.

The solemnization. The reasonable principle, with regard to the official formalities, is quite simple, and positive law is to a certain degree in accordance with it. The State, on the territory of which the official act of the solemnization must be performed, is entitled to regulate how such an official act, — it may be a religious act with civil effect — has to take place. The formalities ordered by the local law are sufficient for a universal recognition of the marriage *quoad formam*; acts, performed in the realm by other officials than the local ones, do not constitute a lawful solemnization. The first or positive part of the rule is almost generally admitted in positive law, the second or negative part is only admitted with exceptions. The first of these exceptions looks like an application, to a solemnity, of the old rule *"locus regit actum"* with facultative effect. According to this exceptional rule, a State is entitled to consider as valid, *quoad formam*, a marriage solemnized by other officials than the local ones or in other forms than the local forms, if the solemnization has been performed according to the rules of the national laws of both husband and wife. The second exception is relating to marriages solemnized by diplomatic or consular authorities, which marriages, with some restrictions, are admitted as lawful, not only in so-called, "capitulation-countries", but also in other countries. As to the particulars, I beg to refer to the Hague treaty which I have already mentioned and to its literature. A regulation relating to the publications of the banns has been inserted in the said treaty. The relation existing between religion and the solemnizations of marriage is well-known; this relation is an impediment to a universal evolution.

Inconsistency, nullity and annulation of a marriage. Inconsistency, with regard to marriage, is a qualification belonging to the domain of universal logic. A marriage is only consistent, when it has

been concluded between two living individuals, of different sex, by means of a serious declaration of their wills. A marriage between a living person and a deceased one is not consistent, and a marriage concluded on the stage does not need an annulation. "Nullity" and "annulation" are not entirely synonymous in the language of positive law, but here the distinction may be left aside, and I shall only speak of annulability. Two very important things are connected with the annulability of a marriage, viz. the general admission of a basis for the annulation, and the jurisdiction. It would not be impossible to establish reasonable principles here. The law applying to the conditions of the solemnization, according to the reasonable principles, would also govern the annulation, and the jurisdiction for the annulation would be granted to the courts and judges of the country, in which the defendant is domiciliated. The positive law is not in accordance with the principles mentioned. The influence of the principle of nationality extends itself to the annulation, and a marriage may be null and void in one country and valid in another. The Hague treaty has not been able entirely to prevent such an effect. In our days, it will not be easy to start an evolution.

The proof of the existence of a marriage. An opposition between reasonable principles and positive law is scarcely to be found. The rule, purporting that the admissibility and the conclusive power of the means of evidence are governed here by the law of the State, in which the marriage, according to the claim, was said to have been concluded, would of course be too mechanical. But when an official and eventually authenticated document is produced, which contains the attestation of a solemnization performed in a well-defined country, and the document would be a relevant proof in the same country, the marriage is proved. Such a case is a simple one. But it may happen that, after many years, evidence of an existing marriage is necessary in a law-suit, relating to legitimacy of succession for instance, whilst both husband and wife are deceased, and no document can be shown. I am of opinion that the admissibility and the conclusive power of the means of evidence must be left to the prudence and wisdom of the Court. The Court, in this way, is able to

take into consideration the stipulations of the law of a foreign country without being obliged absolutely to obey such a law. An international-common rule may be the end of the evolution of the case-law

§ 49. *Juridical Effects of Marriage.*

Subdivision. Personal and patrimonial relations, between husband and wife are, of course, to be distinguished, but as marriage according to many national laws, modifies the capacity of a woman, I shall devote a rubric to this modification.

Personal relations. According to reasonable principles, woman and man have equal rights. Religion and social customs have often established inequality. Marriage, anyhow, is a source of mutial duties and correlative rights for husband and wife, but positive law is generally averse to compulsory measures. It would be in accordance with the reasonable principles to apply to the personal relations, deriving from marriage, the law of the country, in which husband and wife have fixed a lasting domicile, i.e. the law of the social sphere in which they are living *cum animo perpetuitatis*, and to grant to the courts and judges of the same country jurisdiction with regard to such relations. Positive law generally refers to the national law of the married couple, and eventually to the national law of the man, the head of the family. But an evolution is perceptible, as the application of the national law is very often restricted, in so far that compulsory measures are only taken in accordance with the law of the place where compulsory measures are necessary, a place which as a rule will be the home of the married couple. Such a restriction has been inserted in the Hague treaty. The authors often appeal to "public policy", but the treaty has avoided this expression.

The so-called incapacity of the married woman. This incapacity is not based on a reasonable principle, but it would be an exaggeration to place it on a level with slavery, and to apply to the said incapacity the principle applicable to slavery in international law. The lack of a reasonable basis for the incapacity of a married woman excludes an absolutely reasonable international rule, we may only

come to a relatively reasonable one. The latter takes into consideration that the incapacity of a married woman is deriving from the settled customs of a local sphere of social life, and that, when the married woman has her home in such a sphere and has acted in the same sphere, it is not unreasonable, in principle, to apply the law of the said sphere to her capacity. Positive law generally prefers the application of the national law of the woman, which law, as a rule, is that of the husband. In practice, however, we find an evolution, at least when the woman has acted in a local sphere which is not the sphere of her home. Third parties, who have entered in good faith in a juridical relation with the woman, do not remain without legal protection from the side of the local authorities, and this protection excludes an unconditional application of the national law of the woman. In art. 9 of the Hague treaty, relating to this matter, we find the germ of a prudent reaction.

Patrimonial relations. In the antique international law these relations have been called the object of a *famosissima quaestio*. Even in our days serious difficulties often arise many years after the conclusion of the marriage, when a partition of the estate between the husband and the wife or between their heirs has to take place and a basis must be found for the liquidation. The old and new literature is very extensive, but I shall only point out what serves my purpose. The first thing we must bear in mind, is that there is no reasonable rule requiring a close union of the fortunes of husband and wife. The second important point is, that when a covenant is concluded between the betrothed or after the marriage between husband and wife, parties are at liberty, according to reasonable principles, to make any patrimonial settlement that is not against morals. The systems of legal patrimonial relations are creations of positive law, and the special regulations enacted, with regard to capacity to act and to the contents and forms of a marriage-settlement, have the same positive origin. The absence of a reasonable rule is the key of the difficulties. The authors have tried, since immemorial times, to establish a rule which might solve the conflict of the laws by referring to one of the national laws connected with the matter. But the scientists have never agreed with

regard to the choice of a paramount law. According to the opinion of the conservatives, a distinction must be made between immovables, for which the *lex loci rei sitae* is applied "*mordicus*", and the movables. As to the latter, two principles which both lead to a different rule are in opposition, at least where there is no marriage-settlement. According to the first, the tacitly induced intention of husband and wife must be searched for, and this intention is often found to be directed to the law of the place where the married couple has established their first home. According to the other opinion, it is not the latent intention of the betrothed or of the married couple that must be the object of an investigation, there is a law which governs the matter according to the will of a lawgiver, and the law, to which the parties are bound to obey, must be fixed. In the countries where both the principles of nationality and the masculine privilege are admitted, the law to which the parties are considered as being bound to obey, is the national law of the husband, at the time of the marriage or at another time. Such is the regulation inserted in the Hague treaty. I beg to add briefly that, in practice, the designation of the law, which is applied when there is no marriage-settlement, is the main point but not the only one. There may be many and many thorny questions with regard to the contents of a marriage-settlement, its publication, its mutability or immutability after marriage, the so-called *separatio bonorum* and the jurisdiction for such a separation, the interlacing of juridical questions relating to the law of succession with questions relating to marriage law etc.. I refer, in general, to the Hague treaty and its literature. The difficulties which arise with regard to the stipulations of the treaty might lead to a new evolution.

§ 50 *Dissolution of Marriage, especially by Divorce.*

Why divorce is to be the centre of my investigations. There are many causes of dissolution in the positive national laws. Death is a natural one, confirmed by international-common law. Other causes have, at least with regard to their particulars, a positive origin. I am thinking of the so-called civil or fictive death, the presump-

tion of death deduced from a long absence, the disappearance after a shipwreck or a battle etc. etc. Even a change of religion of a consort is sometimes considered as a cause for the dissolution of a marriage. The above-mentioned causes may lead to international difficulties, and even the solution of so-called conflicts may be an inducement to disputes, but I shall systematically follow my method of concentration, and I shall limit my investigations to divorce. In the same spirit I only give a mention to other legal institutions connected with divorce, as the *separatio a mensa et thoro* etc.. That among the thorny matters, divorce is furnished with the sharpest thorns, will be obvious in the following rubric.

Religion and social philosophy. I shall not discuss religious faith, but I must mention religion here, as it is an almost invincible impediment to an evolution. It is well known that one of the world religions considers divorce as entirely prohibited by the Scripture, whereas another world religion has admitted a broader interpretation of the divine word, allowing divorce at least in the case of adultery. It is obvious that in the States where the divine law is the basis of the civil regulations, the question of reasonable principles, contrary to the decision of the Almighty, does not even arise. But I must state that according to opinions based on social philosophy, divorce is a requirement of the reasonable order of social life. The supporters of the legal institution of divorce do not agree about the causes of divorce. Some of them are inclined to admit many causes, others only a limited number, whilst there also are scientists who support the extremest limitation. Divorce *mutuo consensu* is often excluded. Sometimes its result may be attained in a circuitous way. Equalization of the national laws in the matter of divorce seems unattainable. Hence, the question of jurisdiction as to divorce is of the greatest importance.

The general lines of a reasonable solution. In searching such a solution, we must bear in mind that private international law is not the science relating to the conflicts of laws or lawgivers, but the science of the juridical relations between men in a community larger than a State. I am inclined to point out two guiding thoughts and to deduce a rule from their combination. The first is the following.

Religious faith rules the domain of conscience as a sovereign. In this domain no human power is entitled to compulsion. This also excludes one consort from forcing the other's conscience in order to prevent the latter from asking a divorce. The second thought is relating to the reasonable limitation of the sovereignty of the State on individuals. The views of the various States are different in the matter of divorce; each of these views deserves respect *in its reasonable sphere of competency*. The State, according to my opinion, exceeds the reasonable limits of its sovereignty, by enacting a rule which forbids divorce to its subjects in such a manner, that the prohibition is absolutely indestructible. Husband and wife, especially the wife, must be at liberty to establish their home, *cum animo perpetuitatis*, in the realm of another sovereign, and to obtain a divorce there, the effect of which must be recognized everywhere. The regulation of the jurisdiction, of course, must be in accordance with the general rule.

Positive law and practice. The distance between the guiding thought of the foregoing rubric and positive law is as great as that between the arctic and the antarctic poles, if not greater. The law-givers, in the matter of divorce, are not at all inclined to allow an evasion of their national laws by their own citizens; even a naturalization is open to suspicion, it may be considered as a FRAUD. The States are not either inclined to pronounce a divorce between aliens, on the mere ground of their personal law. The jurisdiction is regulated in conformity with the material regulations. A foreign judgment, admitting a divorce, is subjected to conditions; with regard to subjects of the State, its effects may even be absolutely denied.

The compromise, inserted in the Hague treaty, relating to divorce. I call it a compromise. The conference has endeavoured to come to a positive result, by means of remarkable diplomatic skill. And really the treaty has established a rule, according to which a divorce, pronounced under certain material conditions and within the limits of a fixed jurisdiction, will be considered as a dissolution of the marriage in all the contracting States. This result has been attained on a double basis, viz. that of a combination of the principle of nationality with the principle referring to the *lex fori*, in such a way that a

divorce will only be obtained if the claim is in accordance with two laws, both the national law of parties and the law of the State in which the Court, before which the claim has been introduced, is sitting. As to further particulars, I refer to the literature.

§ 51. *Procreation, Consanguinity and Affinity.*

General remarks. Procreation is a natural fact, consanguinity and affinity are natural consequences of marriage. Maternity, legitimate or illegitimate, can be proved directly. The maternity of a married woman presumes the husband's paternity. Natural facts like the above-mentioned cannot be disregarded and the laws cannot be in entire opposition with regard to such facts. But immemorial customs and prejudices are conservative in the highest degree. Even with regard to legitimacy the national laws are divergent. The law-suit, introduced with the aim of depriving a child of the quality of a legitimate offspring, is not regulated everywhere in the same way, and the legitimation by subsequent marriage or *per rescriptum principis* is not admitted everywhere. This is also the case with regard to adoption. The regulations of the legal consequences of consanguinity and affinity are different. In comparing the laws about illegitimate procreation, we find still greater divergences. The question of the admission of the action, which tends to affiliation, is a very delicate one, especially with respect to illegitimate paternity. The rights of illegitimate offspring are often limited. Adulterous or incestuous issue, although it is only guilty of the fault of having chosen the wrong parents, is often ill-treated by a severe lawgiver. The discrepancies of the laws make the question of jurisdiction a question of decisive importance.

Reasonable principle. The divergences of the laws, in our matter, are the consequence of local customs and prejudices. Hence the reasonable principle would be a submission of the concerned individuals to the law of the local sphere, in which their home is fixed *cum animo perpetuitatis*. This principle ought to be applied prudently as a guiding thought, and not as a mechanical solution of conflicts between laws. Its application would bring harmony between the princi-

ple governing the jurisdiction and that relating to the application of a law.

Positive law. It is both under the influence of the principle of nationality and of the doctrine of "public policy" and hence the laws of the nations differ widely from the reasonable principle, both with regard to the material law and with regard to jurisdiction. The principle of nationality implies that the lawgivers are inclined to bring their own subjects, even when their home is fixed in a foreign sphere of social life, under the absolute authority of their national laws, and this authority will logically require an extension of the jurisdiction. In so far however as the State takes jurisdiction on aliens who have settled in its realm, its courts and judges will bring the national laws of these aliens under the censure of the local conception of "public policy."

The germs of an evolution are insignificant. This is a consequence of the stubbornly conservative spirit of local customs and social prejudices. The deep difference, made by the laws between marriage and free love, generally brings along a divergence as to the legal state of legitimate and illegitimate offspring. A revolution in the world of thought must precede the evolution of international law [39 & 40 Vict. C. 61. — *Dr. Barnardo v. Mc Hugh*, A.C. 1891, 388.] As to the practice in the *actual state of the national laws*, a transitory agreement between the States, on the basis of the principle of nationality, could prepare an evolution, provided that the said principle would only be a guiding thought, enabling the courts and judges to reckon with the spirit of their own national law. I do not expect an evolution to come soon.

§ 52. *Protection of Infants and Personae miserabiles.*

General remarks. As to the status and the capacity of persons I beg to refer to § 45. The protection of infants, lunatics and other individuals in need of protection, is a very important subject-matter, but it may be discussed briefly, as this discussion is chiefly a repetition of former considerations. The divergences between the laws are not small, although the protection is a matter naturally deriving

from social intercourse. The main point is to trace out exactly the demarcation-line between the autonomy of the family and the interference of Society. Incidental differences between the positive laws are the age of majority, the parental powers, the organization of the protection, the legal representative power of parents, guardians etc. etc.. It is obvious that here the question of jurisdiction is also very important.

The principle. Referring to the considerations laid down in § 45, I consider the predominance of the principle of the lasting domicile, in the sense of a home fixed *cum animo perpetuitatis*, as the final aim of the evolution of private international law. The State, in the realm of which the centre of the social life of an infant or lunatic is fixed, has the duty to protect the individual who is in need of protection, and the de facto power of effective protection is also in its hand, so that this State is entitled to reasonable jurisdiction.

Positive law. The principle of nationality, in our matter, is considered predominant in many States. But, at least with relation to lunatics, whose protection requires effective measures taken in the place where the patient is a danger for himself and for Society, we see that the local law is considered predominant, for the sake of public policy, the last expression being taken in an almost literal sense. In any case, "public policy" is here an adjuvant of the evolution. Even there, where the principle of nationality is not generally admitted as the basis of private international law, the State considers it its duty to protect as well as possible its own subjects living abroad and needing protection on account of age or health (*Re Willoughby*, 1885, Ch. D. 324). It is quite natural and logical, in such a state of things that the extension of the jurisdiction is adequate to the extension of the State's interference.

The way of the evolution. A glance at the positive international law and its practice will show that the evolution is advancing by degrees. On the first degree we find the paternal authority, an antique institution which calls to mind patriarchal times. With respect to this authority, the organization of the family, as a national institution, grants a very great power of resistance to the principle of nationality,

although, in case of outrageous misconduct of the parents, local authorities will not hesitate to interfere. On the second degree we must place guardianship. The State, on the territory of which an infant has its home and the centre of its fortune, will not easily abstain from any interference or supervision. In such a case an unlimited power of foreign diplomatic envoys or consuls, exercised with regard to local juridical relations, will not be agreeable to the local authorities. The third degree of evolution is represented by the measures of protection for lunatics, spendthrifts, absent people etc.. In such cases the local auhorities are becoming more and more conscious of their duties and correlative rights. Absence, as a legal status, is not so much a status of a person as a status of .... a domicile. With regard to the codification of some international matters, a comparative study of two of the Hague treaties, the first and elder one relating to guardianship and the second and younger one relating to lunacy etc., will show the existence of two remarkable degrees of evolution.

Thirteenth Section.

GOODS.

§ 53. *Preliminary Remarks.*

Fundamental conceptions and qualifications. The conceptions of a "good" or "thing in a juridical sense", as well as the conceptions of a "fortune" or an "estate", belong to international-common jurisprudence. Many qualifications of a good or a thing are also universally admitted. If a Court has to decide whether a good is corporeal or not, fungible or not, consumable or not, such a Court will not put ltself the question which law governs these qualifications. Properly speaking this thing should also be the case with immovable or movable goods, but the lawgivers have modified the nature of things and applied the distinction to incorporeal goods, such as rights. Hence, the immovable or movable nature of a good has raised, in the form of a classical conflict of laws, the question to be discussed in the next rubric.

The classical question of the law which governs the qualification of a good as immovable or movable. The answer to this question must be given by means of a system of investigation, in which the solution of conflicts of laws is not a scientific aim, but only an instrument which serves to apply the reasonable principles of social life. Such a method leads to the conclusion that an answer to the question, quoted in the rubric, must not be given in the form of a mechanical reference to a law. No reference to a law is necessary to determine if a human being is a male or a female, living or dead, sane or insane. Without mechanical reference to a law, a judicious court of law will take into consideration the situation of a good, in so far as it is influential on a juridical relation, and if the situation of a good is changed after the formation of a juridical relation concerning this good, the Court will respect, as far as possible, rights regularly acquired during a former situation.

Division of the matter. I shall only apply the qualification of immovability or movability to corporeal goods. Such is the nature of things. I grant the antique "statutum reale" the place in the Museum of juridical antiquities, which is in accordance with its historical importance. The explicit words of a positive law, qualifying as movable a thing immovable according to its nature, or inversely, will be applied to a good, when the juridical relation, concerning such a good, is governed by this positive law.

§ 54. *Corporeal immovable Goods.*

The antique rule and its alloy. According to an antique rule, a corporeal immovable good is absolutely governed by the law of the place where it is situated. The alloy of the rule is to be searched by means of the touchstone of the reasonable principles of social life. Not the will of a sovereign, but the requirement of a reasonable social intercourse of men, is the decisive element. An investigation, conducted in conformity with a sound method, will show that the antique rule is partly correct. It is in conformity with the requirements of a reasonable social life, where a simple well-defined corporeal

immovable good is concerned, and, in a such a case, it is applicable to the rights acquired by an individual on such a good, viz. ownership, rural servitude, mortgage etc.. But the antique rule is not in conformity with the above-mentioned requirements, when it claims to govern the capacity to dispose of the good, or when it is applied to juridical relations as succession, patrimonial relations between husband and wife, bankruptcy etc., which relations embrace a *fortune as a whole.* The result of the application of the old rule, in such cases, would be a division of the immovable part of the fortune into so many groups as there are countries in which one or more of the goods are situated, and an absolute submission of each group to the law of the country of their situation. Such a division of a fortune is not in conformity with reasonable principles.

Positive law. Its leading thought is very often in our days the absolute sovereignty of the State, and not the reasonable regulation of relations between men. Especially in the law of successions, we shall find a mordicus clinging to the ruling power of the *lex rei sitae.*

Some success of the attempts to start an evolution. Attempts have been made in the Hague treaties concerning private international law. They have met with success in so far as the treaties have been put in force. In the treaty concerning guardianship an article has been inserted, stating that the guardian's administrative power extends itself over the ward's entire fortune, the situation of the goods being immaterial. The treaties relating to the protection of lunatics and to the patrimonial relations between husband and wife are framed in the same spirit. A few exceptions confirm the rules. In the draft of a treaty concerning succession, an attempt has been made to establish the rule that the entire estate of the deceased is to be governed by a unique law. The attempt has met with some opposition.

Remark about the modifications of the frontiers of a State. It is reasonable to respect, in such a case, rights which were regularly acquired before the modification. The practice is, in general, in conformity with the principle.

§ 55. *Corporeal movable Goods.*

Division of the subject-matter. There are many kinds of movable goods. For the sake of my systematic work, the following division will do. In the first place I have in view the simple corporeal movable things, viz. the commodities or objects of trade. The second category will include the vessels, especially the sea-going merchant-ships. The third species contains the instruments to bearer, being corporeal goods with which an incorporeal claim is connected, or as it has sometimes been said, in which it is "incorporated".

Simple corporeal things or commodities. In the antique doctrine of the conflicts of laws, the authors have been in search of a general rule, which would solve the so-called conflict, with regard to movable goods in general, by referring to a law. In the beginning, where the movable goods, belonging to a man's estate, were mainly dress, personal ornaments and weapons, a fiction was admitted. Movable goods, according to this fiction, were considered as "localized" in the domicile of a person, and therefore the law of the country of the domicile was the law governing the movable goods. In later times, the nationality of the owner of a good took the place of his domicile, especially as to succession. Then, as commodities became a matter of trade, the law of the situation of the things entered into competition with the law of the domicile and the national law of the owner. As a reverent disciple I have always taken due notice of the works of my predecessors, but none of the ancient rules could ever satisfy me. I am of opinion that the fault of the old doctrine lies in its defective method of searching the claims of the States instead of the requirements of the social intercourse between men. An investigation of the latter has led me to the following reasonable principle. He, who has acquired, in normal intercourse and in good faith, a right to a movable good, according to the law in force in the place where the good is de facto lying, must be considered as being entitled to the said right everywhere. Exceptions to this rule may be admitted when a social interest, *stronger than the interest of the maintenance of a regular intercourse in good faith*, is concerned with

the matter, in the case, for instance, that the goods have been stolen. Money, as a peculiar thing, may be the object of a special rule. Apart from the exceptions, the general rule, containing a stipulation in favor of the regular acquisition in good faith, is subjected to restrictions. It may be that the good, after the regular acquisition in good faith, has been conveyed to another country, and that a new right has been acquired on the good, also in normal intercourse and in good faith, according to the law of the new place of situation. In such a case the new right is to be preferred to the old one. The above-mentioned rule, with its exceptions and its restrictions, is in conformity with requirements of a reasonable social life. The positive laws are at variance. The younger codifications have generally admitted the rule of article 2279 of the French Code Civil or of § 935 of the German Civil Code. Such positive rules contain the germ of an evolution. They are framed with a view to national intercourse, but, in so far as the laws are silent with regard to international social life, an international-common rule may be laid down in the case-law. If, after THE WAR, the idea of an international uniform law concerning the "sale of goods" is put in practice, the question relating to property, mortgage etc. or movable goods will have to be solved, and an evolution will be started.

Vessels, especially sea-going merchant ships. Men of war are not concerned here, fluvial ships may be assimilated to sea ships, in so far as they participate in international fluvial navigation. I shall only mention the latter in passing. A civil law relating to airships has not yet been enacted. As to our special subject-matter, the sea-going ship, I must point out that, although the rule purporting that a ship is a floating part of the State's territory is an exaggeration, there is a juridical relation between the State, under whose flag the ship is sailing, and the ship itself. But it is not quite right to consider the matter as a conflict of laws and to refer generally, by a supernational rule, to the law of the State whose flag the ship is flying. Not sovereignty, but reasonable intercourse is the decisive point. A ship may be under obligation for debts which were contracted in a foreign port, it may be seized there and sold for the benefit of its creditors.

In such a case an absolute application of the law of the flag would not correspond to the requirements of a reasonable social life, which ought to be decisive. With regard to these requirements, I am inclined to establish a reasonable principle of the same nature, *mutatis mutandis*, as the rule of the foregoing rubric. He that has acquired, *according to the law of the flag*, in normal intercourse and in good faith, a right on a ship, is to be considered as being entitled to this right everywhere, but for exceptions and restrictions, similar to those, pointed out in the former rubric. A most valuable progress would be realized if the collectivity of the States would come to an international unification of the merchant-shipping law. A starting-point can already be ascertained. A complete international codification would include uniform regulations concerning the right to fly a flag and the official recording of merchant ships. Such a result seems to be attainable in time of peace. By adding that a man of my age may not expect to see the end of the evolution, I hope to escape the reproach of being a "flying Dutchman", who is navigating under a sky-blue flag.

Papers to bearer. I hope to discuss in §57, in general, the papers with which a claim is connected, here I only take into consideration papers to bearer. The paper, as a corporeal good, and the claim, as an uncorporeal one, are of course two different things, but here they may be brought, if not under a unique rule, at least under two *parallel rules* which are both based on the requirements of a reasonable order of social life. These rules refer to acquisition in good faith and in regular circumstances, under the exceptions and restrictions stated in the two former rubrics. In such a way, there will be harmony, between the corporeal thing and the incorporeal claim. It would be useless to grant to the paper a nationality, which of course would be a peculiar one. The theory of the "incorporation", may be disregarded, its explanation of the materialization of a claim is less intelligible than the unexplained matter. If an international agreement could be attained about the "sale of goods", such an agreement could of course include the papers to bearer and even money and banknotes.

§ 56. *Incorporeal Goods of an absolute Nature.*

Preliminary remarks. The nature of such goods belongs to the universal jurisprudence. For the sake of this system, I think it sufficient to say that there are incorporeal goods, being a part of a man's fortune, the nature of which is in so far absolute that every fellow-man is bound to respect the owner's right. I am not thinking of honor, freedom and similar goods, which, of course, are of great value but which are not parts of a man's fortune. Neither shall I discuss rights as property, mortgage etc. Such rights are always connected with a corporeal thing. The right of property, besides, coincides with its corporeal object, in universal jurisprudence. The expression "This thing is mine" is synonymous to "This thing is my property". Among the incorporeal goods which remain, I shall select, as a matter of short discussion, two species, viz. *copyright* and *patents for inventions*. These goods are incorporeal elements of a fortune, they are in principle transferable, able to be mortgaged, to be attached by a creditor and to be sold for his benefit.

Copyright. In general I refer to § 22. I have pointed out, there, that ART is a common good of mankind. The right of an artist to the economical value of his work is perfectly in accordance with reason. This right shows an international side. It cannot, if I may say so, be localized, in so far that it should only exist within territorial limits and vanish beyond them. The State's duty is not only a duty of local protection. Collaboration is a common duty of the States. This is in our days the spirit, both of the national laws and of the international union, established by a well-known treaty. As to the international union for the protection of copyright, I refer to the literature. The indestructible cosmospolitan nature of ART will outlive the passions, that have been roused by THE WAR.

The right of the inventor and patents for inventions. The right of the inventor exists independently of the grant of a patent, but I concentrate as usually the attention of the reader, this time upon the patents. In general, although only in general, the considerations of the foregoing rubric are applicable here. It is perfectly reasonable

that the first inventor should have at least a temporary right to the economical value of his invention and that his right should meet with international recognition. But there are great differences between the artistic work and the invention. The invention is not, in the same degree as the artistic work, an emanation of the personality. The exclusive right of an artist does not detract a part worth mentioning from the large field which is left free for his competitors. The right of the inventor, on the contrary, shuts off an important field for other men. The work of art bears its value in itself, the invention must be a new one and, moreover, on account of its influence on the field of activity of competitors, it must be exactly described and published. The question of the advisability of a previous official inquiry as to new inventions is an open one. Hence the national laws, relating to patents, do not show the same cosmopolitan spirit as the laws concerning copyright. There is a very great difference between the effect of a foreign patent and that of a copyright acquired abroad. An inventor who wishes to have his invention patented in several countries, will be obliged to take the necessary steps in each of these countries. The union-treaty, concerning the so-called industrial ownership, has granted facilities but this treaty has not the large tendency of the treaty concerning artistic ownership. National selfishness is much more influential on inventions than on artistic works, not only because a nation aspires to the glory connected with the first invention, but because the exclusive right of a foreign inventor may temporarily impede the development of national industry. The influence of THE WAR, of course, has been greater in patents than in copyright, it might even last longer.

§ 57. *Incorporeal Goods of a relative Nature.*

Preliminary remarks. The goods I have in view here are claims, viz. *obligations considered as a part of the creditor's fortune.* They are in principle transferable, they can be seized by a creditor of the creditor, and sold or cashed for his benefit. I am not thinking here of the substance-matter of obligations, which will be discussed in the next section. It will here be sufficient to make a distinction,

under reference to earlier considerations, between *simple claims* and *claims which are connected with a corporeal paper* in any way, in so far that he, who is entitled to the paper in accordance with its context, is also entitled to the claim, described in the paper.

Simple claims. An important international question arises, in the case of a transmission, a mortgaging or an attachment, when the original debtor and the original creditor are domiciled in two different countries. In order to concentrate the attention, I wish to separate the case of transmission from the two other cases mentioned, and I shall consider it as the predominating matter. In international matters, we have to do with the question how the claim will pass, from the fortune of the original creditor, to that of the new one, in such a way that the juridical security of the international intercourse is insured. Of course, the claim must be transferable, but this is a question which depends on the substance-matter of the claim. The transferring creditor must possess the capacity to dispose, which is a point concerning his status and capacity. But the main point to be discussed here is the following requirement of the reasonable order of social life. The transmission of the claim must be effectuated and brought to the knowledge of the original debtor, in such a legal manner, that this debtor may pay the amount of the debt to the new creditor with full security. Hence, as the original debtor is living under the jurisdiction of the courts and judges of the country in which the centre of his social life viz. his domicile is fixed, the transmission and its notice must be in accordance with the law of the country in which the original debtor is domiciled. The expression "domicile" is here, of course, to be brought in connection with "jurisdiction", Positive law is not purposely averse to the above-mentioned reasonable principle, but the extension which is often given by national laws to the juridiction of the national judiciary, when the defendant happens to be an alien, does not entirely prevent the danger, for the debtor, of being obliged to pay the debt more than once. When the courts and judges are reasonable and at liberty to act reasonably, such an unfair effect will be prevented, and gradually the international case-law may become an international-common law.

Claims connected with instruments. I have discussed in § 55 the instruments to bearer and must investigate now in how far the rule, which is based on normal acquisition in good faith, may be extended to nominative and endorsable instruments. It is my opinion that, *mutatis mutandis*, such an extension is really a requirement of the reasonable order of social life. Hence, the general principle, concerning instruments as elements of a fortune, would be that he, who has, in normal intercourse and in good faith, acquired a nominative instrument by means of *transcription and delivery*, an indorsable instrument by *endorsement and delivery*, and an instrument to bearer by *simple delivery*, will have a right, which ought to be recognized everywhere, subject to the exceptions and the restrictions, pointed out in § 55. Positive law is not always in accordance with the reasonable principles. Regulations, according to which a conflict of laws is to be solved by the application of a fixed law, are sometimes to be found in national laws, especially in acts and ordinances relating to bills of exchange. I shall come back to this subject in the following section. Of course, when a strict provision of a national statute is in contrariety with the reasonable principles, the positive provision will prevail before a Court, which is bound by the said statute. It is only when the national statutes are silent, that a Court is free and that an evolution can take place, in the good direction, by means of the international case-law.

Fourteenth Section.

OBLIGATIONS.

§ 58. *General principles.*

Preliminary remarks. I refer, in general, to my work published, in 1906—1907, on the substance-matter of obligations in private international law. The substance-matter of obligations is only a part of the general law of obligations, but I beg to remind the reader that I have discussed, in the tenth section of this system, the juridical relation, and in § 45 the status and capacity of persons. Hence, I shall be as concise

as possible in the present section, under reference to my former study. With regard to one matter, I must consider the substance-matter of obligations, in the present work, from a higher point of view than I did in my former work. In the latter I took the point of view of the judge, whose national law is silent as to the international law of obligations, whilst here I must also look upon the matter from the point of view of the collectivity of States. Another observation is relating to commercial obligations. I intend entirely to disregard, in the present section, the distinction, which is made in some positive laws, between commercial and civil obligations. The whole following section, however, will be devoted to the discussion of the influence, which trade exercises on private international law.

International-common rules in the law of obligations. In the general doctrine of the law of obligations, the Roman law to a great extent remained the international-common law of the world. The fundamental rules of the Roman law, concerning the nature of the obligations, their various kinds, sources, general effects and dissolution, have retained their value as reasonable rules, and in our days still possess the positive force of international-common rules, so that very often a reference to a national law is not necessary. Not every part of the Roman law of obligations has preserved its practical importance for modern social life. Some kinds of obligations as the alternative and indivisible obligations have almost lost their significance, but other kinds, e. g. the obligations with joint liability, have greatly developed with respect to commercial partnerships and to bills of exchange. I dare say that even the Roman doctrine of the sources of the obligations is a part of the international-common law, provided that this doctrine be reasonably constructed. Such a construction may be expected in our days. It is my intention to attempt to do so in the next rubric.

The doctrine of the sources of the obligations. A brief analysis will show that the international-common element, in every source of an obligation, is a *requirement of the reasonable order of social life.* Why is a serious contract the source of a social duty to perform this contract? The debtor 's will may be an individual cause of the duty,

the social cause is undoubtedly the confidence roused in a serious man by the declaration of another serious man. What is the reason that a tort is the source of an obligation? The fault of the man who committed the tort may be an individual cause of duty, the social cause is the disturbance of the reasonable order of social life. This social cause may even exist when the disturbance of the order is not the man's fault. We may also ask why the emission of a bill of exchange is the social cause of an obligation, and, as social cause, we shall not find the will of the drawer, but the confidence roused in the public by his signing the instrument. Such a social cause may be found in the other kinds of obligations, deriving from a so-called *quasi-contractus* as the payment of money by mistake, or as services rendered without previous agreement. Even with respect to obligations, deriving from a community of interlaced interests, existing, for instance, in the case of a general average-adjustment, a requirement of the social order of social life can be ascertained .The fact that such a requirement is the source of every obligation is very important when an attempt is to be made to "*localize*" an obligation, i. e. to bring it in close connection with a local sphere of social life.

The law of the local sphere of social life, governing an obligation. I refer, in general, to § 42. Many first rate authors, my predecessors in the domain of international jurisprudence, have attempted to establish a general rule, referring to a national law, which must govern an obligation or at least a contract, this latter being the most important source of obligations in international social life. The general thought of my predecessors was, that the classic method leading to the solution of conflicts of laws ought be followed, and that therefore a choice ought to be made between the various laws, connected with an obligation in any way. As many laws could be considered to be in conflict with one another, and as some authors preferred one law and others preferred another, the authors' opinions are contradictory. The oldest competitive laws were the law of the place where a contract had been concluded (*lex loci contractûs*) and that of the place where the contract had to be performed (*lex loci executionis*). Both laws had their supporters. Other jurists preferred the national (domiciliary) law of the parties — or, in case

of difference — the national law of the debtor (*lex patriae*). The law of the Court, before which a law-suit was pending, claimed, at least in some cases, the highest authority (*lex fori*). And, last not least, the doctrine which would leave, to the expressed or latent will of parties, the choice of the law which had to be applied, has found many adherents (*Doctrine of the autonomy of parties*). When I undertook to write my work, quoted in the beginning of this section, I had to find my way in the labyrinth of these opinions. The following thought was the thread of Ariadne to me. I had so much reverence for my predecessors, that I felt convinced that none of them would have advocated a rule, which would not give a reasonable solution in any case. And so I decided to follow another method than they had followed, i. e. to avoid the establishment of a general rule, but to analyse the various obligations carefully, in order to examine *in which cases the classic rules of my predecessors would offer a reasonable result.* In this way, I have attained the following result. *Often but not always* I have found such a close connection between the social cause of an obligation and a definite local sphere of social life, that the obligation could be localized i. e. considered as belonging to the said local sphere, in which case the application of the law of that sphere to the obligation had to be considered as a requirement of the reasonable order of social life. In my opinion the various points of contact, which my predecessors considered as elements of a general rule, are no more, apart from their value for the interpretation of a contract, than *instruments for the localization*, which is often but not always possible. The last restriction takes away the mechanical character of the rules established for the solution of the so-called conflicts of laws, from the principle of localization. *Not every obligation has a seat in a definite local sphere of social life.* It may be an obligation belonging to international social life. In this case the obligation is governed by the international-common juridical rules, if they exist, and if they do not exist, by the reasonable principles of social life, which the judge will apply for the sake of reason. I confess that the localization-principle is not so easy in its application as a mechanical rule solving the Gordian knot of a conflict by referring to one definite law, but I beg to remind the reader that international

social life is knotty, and that it is better to untie a knot patiently than to cut it through with a sharp knife. Besides, if the State, in its isolation, or the judiciary of such a State, is not able to do more than to apply the localization-principle and its subsidiary rules, the collectivity of the States has the power to do more, viz. to equalize the law relating to a special contract or an obligation. The forms of such an equalization have been indicated in § 10. An evolution has been started. I shall only remind the reader of the international treaty concerning the carriage of goods on international railways, and the regulation of some points of the civil maritime law. A draft-treaty relating to bills of exchange has been elaborated. In the countries, where the lawgivers have been so prudent as to avoid any mechanical rule, the case-law may prepare an exhaustive international-common law.

Application of the localization-principle. This is a subject which requires a series of monographies. It is not my intention to go so far. It will be sufficient to show that, with regard to many obligations, localization is often possible. The following paragraphs will be devoted to such an endeavour. My discussion will also be a guiding-thought with respect to the reasonable limits of the autonomy of parties in the matter of contracts. When a contract can be localized, the parties are only free within the limits traced by the law of the local sphere to which their contract belongs; parties are bound by the prohibitive laws of that sphere. If the contract cannot be localized, parties are free in principle, but they ought to make a serious and reasonable use of their freedom, and their covenant is submitted to the censure of the court before which a law-suit is brought. The justification of this censure is the fact that the basis of international private law is the reasonable order of international social life.

§ 59. *A Review of the principal Species and Contracts.*

My classification. There are many methods to be followed. I shall make use of a classification based on the social aim of a contract. Such a method will simplify the localization.

Contracts based on the social value of goods. There are many

contracts of this kind. In our days the oldest of them, the *exchange*, has lost its importance for the international trade. Other contracts that have been used for many centuries are *sale, hire, custody, loan* in its two forms, and the agreements concerning the establishment of a *mortgage*. In modern times the agreement between a hotel-keeper and a traveller, an agreement which includes a special custody of the traveller's luggage, has acquired the rank of a *contractus nominatus*. Its localization is easy. Some forms of the sale, the sale of a business-concern with its good-will, and the sale of an inheritance as a whole, have developed as specially regulated agreements. The covenant between an author and a publisher is often legally regulated. In almost all the above-mentioned contracts, parties are free to make the regulations that suit them. The stipulation referring to a definite foreign law, which according to the will of the parties will govern the substance-matter of the obligation deriving from the contract, is not prohibited, provided that the election is not unreasonable or capricious. The parties are not always free. As to the loan of money with interest, freedom is often excluded. An analysis will show that the localization of the various forms is often but not always possible. The sale of goods, for instance, will be localized if it is concluded in a market or in a stock-exchange, or even in a shop between the shopkeeper and a foreign tourist. The contract of hire wild be localized if it concerns a house or a rural good. For the rest, I beg to refer to my former work. If localization appears to be impossible and if at the same time a form is of great importance, the application of the international-common rules and in default of them of the reasonable principles may be really unsatisfactory. But, in such a case the remedy is not the establishment of a mechanical rule for the solution of a so-called conflict, but the equalization of the national laws. Such an equalization would be practicable, in time of peace, with regard to the sale of goods, a contract which is concluded every day and which is of the greatest importance for the universal trade.

Contracts based on the social value of labour. In the Roman law, such contracts were subdivisions of hire,but in our days they form a very large and peculiar category, which is at least equally important

as the contracts of the previous rubric. Three forms must be distinguished, viz. *employment with subordination, profesional services without subordination,* and *the contract to undertake and achieve a definite work.* Representation is a service of a peculiar nature. It may be a direct or an indirect representation. It is not necessarily connected with a mandate. Often but not always the localization of the above mentioned contracts is possible. The nature of the labour, the spot where it is to be performed, the professional centre of the party which has undertaken to fulfil a professional duty, may closely attach the contract to a local sphere of social life. The contract of employment of the master and the crew of a ship may be localized in this way, by means of the flag of the ship. The danger of a mechanical reference to the *lex loci contractûs* or the *lex loci executionis* is easily perceptible in the case of a representation. The relation between principal and agent does not necessarily belong to the same sphere of social life as the relation between the principal and the man, with whom the representative has concluded a contract.

Contracts based on the social value of credit. Credit, the contractual grant of the disposal of a value, is an element of many contracts, but there are contracts in which credit is the main thing, viz. the *opening of a credit, the letter of credit* and *the running-account.* Localization is often possible, by means of the professional centre of both parties, or even by that of the party that gives the credit. The fact that the credit has been opened with regard to a work to be performed in a definite place, may also be the basis of a localization. The laws, however, are generally silent as to the details of the abovementioned contractual relations, so that the judge can often come to a reasonable solution, without localization, by means of the usances of the international trade, or, in default, by applying the rule that the confidence inspired by a declaration of will to a serious man is the standard of the obligation of a debtor. An international-common law can be established in this way.

Contracts based on the social value of chance. Chance, compared to credit, stands to it in the same relation as confidence does to hope, but hope, the imaginary representation of a valuable thing to

be, is a very powerful moving-spring for risky contracts. The lawgivers, who are well aware of this fact, have prohibited or limited certain forms. The most prominent forms of contracts, the principal aim of which is the value of chance, are the *stock-exchange-job* an the *lottery*. I do not reckon insurance among the present rubric. The localization of the contracts, based on chance, is often possible by means of the professional centre of parties, the stock-exchange or even the country to which the lottery is confined. In such cases, the freedom of parties is limited by the law of the sphere of social life to which their contract belongs. But, when a claim, based on an aleatory contract, is brought before the judge of another sphere of social life than that to which the contract belongs, this judge will take the sense and the international range of the prohibitive provisions of the *lex fori* into consideration. It is better not to speak of "public policy". The aleatory contracts are not in favour in positive law, and a unification of the national laws must not be expected in our days. The favour of the public, on the contrary, is very great; the loser will sometimes be rejoiced at the severe prohibitions of a law, to which he may appeal in order to withdraw from his liability.

Carriage. The elements of a contract of carriage, the starting-point, the way and the destination may be in the same State. In such a case the localization is very easy, but the localized form is without importance to international trade. The really important form, the *international carriage* generally escapes localization. But the juridical relations, connected with a carriage, are manifold, and although the carriage cannot be localized as a whole, it may be decomposed so that a part of the relations is localizable. Some relations are closely connected with the starting point, viz. the relations between the shipper or consigner and the carrier, and those between either of them and an interfering forwarding-agent; such relations can be localized there. A second category of relations are those between successive carriers. Such relations develop during the carriage, and can only be localized under special circumstances. A third category is connected with the point of destination viz. the relations between the carrier or carriers, eventually the last of them, and the receiver, who may be holder in good faith of a bill of

lading; these relations can be localized at the point of destination. The practice is not averse to such a dismembering of the carriage. It is often asserted, although in the form of a rule which is destined to solve conflicts of laws, that carriage in general is governed by the *lex loci contractûs*, i. e. in general by the law of the starting point, but that the obligations, to be performed at the place of arrival, are governed by the law of that place. This will often lead indirectly to a reasonable result. I only wish to mention the conveyance of passengers and other forms of corporeal or incorporeal communications. As to the international carriage of goods, I beg to add that if the localization-principle is not quite satisfactory, the collectivity of the States has the power to unify the laws. Such a unification has been partly accomplished with respect to the carriage of goods on railways. An inducement to such a unification is the question of the liability of the carrier and the liberty to limit this liability in charter-parties or bills-of-lading.

Partnership. The old type, the Roman *societas*, has not entirely lost its importance, The legal regulation of the old type mainly concerns the juridical relations *between the partners*, relations which often can be localized easily. In the modern legal systems, the internal relations are no longer the principal part. Modern laws on the contrary emphasize the external relations, the *relations between the partners* — or the corporation founded by the partners —, on one side, *and the public* on the other side. As to these last relations the principle of the localization brings along that the partners or the corporation, which they have called into existence, are to be submitted to the laws of the various spheres of social life in which they are active, in proportion of their penetration into those spheres. As to corporations, I beg to refer to § 46. As to the application of the principle of localization with regard to non-corporative partnerships, I beg to refer to my former work. The Courts will be able to prepare an international law by means of an application of the said principle. The unification of the laws is not very probable. Even with regard to commercial companies there is no unanimity.

Insurance. I have already said that I do not reckon insurance among the aleatory contracts. I consider insurance as a peculiar asso-

ciation of men, running the same risk or having the same future event in view, and intending to bring together, by means of a great number of relatively small contributions, a capital large enough to bear the payments with a view to which the capital was raised. This conception includes both the insurance of goods and the life insurance. It covers both the professional and the mutual business-concerns. The juridical relations, connected with the various forms of insurance are so manifold, that I feel obliged to refer for particulars to my former work. I only wish to point out that, on one hand, the centre of business of the insurer may lead to a localization of the contract in that centre, but that, on the other hand, the establishment of a branch office in another country may be considered as a penetration of the insurer into the local social life of the sphere where the branch office is established. Besides, the liberty granted to the parties with regard to some branches of insurance, is, when not unlimited, great enough to allow the formation of international-uniform policies. A common law might be prepared in this way.

Other contracts. I mention them *pro memoria*. An important category contains contracts tending to the consolidation of existing juridical relations. To this category I reckon *bail*, similar securities, and *arrangement*. As to particulars, I must refer again to my former work. I must do the same thing with regard to the *contract of donation*. The juridical nature of donations is a matter of scientific dispute. The conception of the donation as a contract is not universally admitted, in many positive laws the donation is a peculiar juridical institution, which is more like a last will than like a contract. The difficulties, connected with the donation are great enough, but the importance of the subject-matter for the international social life is in inverse proportion to its difficulties.

§ 60. *Negotiable Instruments, appealing to public Confidence.*

Preliminary remarks. Some points connected with such instruments have already been discussed. The instrument, considered as a corporeal or material thing, has been treated in § 55. In § 57 I have dealt with the claim, connected with or incorporated in the material

thing. In the present paragraph I shall discuss the obligation, the source of which is not a contract with a definite man but an appeal to public confidence, as I have pointed out in § 58. There are a great many negotiable instruments, but, according to my method of concentrating the reader's attention, I shall only deal with one instrument, viz. the bill of exchange. It may be called the prototype, even the progenitor, of all the other instruments.

Principles of the international law concerning bills of exchange. An obligation, the source of which is an appeal to public confidence, must have the same extent as such confidence. There may be many signatures on a bill of exchange, especially those of a *drawer,* an *acceptor* and one or more *indorsers.* The obligations deriving from these signatures are not the same, they depend on various conditions, they are, to a certain degree, independent of one another. If the confidence inspired by every single signature has to be accurately measured, each of these signatures ought to be brought in connection with the law of a definite sphere of social life, and the said sphere can only be that in which the bill of exchange, when being inspected by a serious man, indicates that the signature has been written. Not the place where the signature has been written in reality, but the "fiduciary" place, the place to be taken into consideration by a serious man who inspects the bill, is decisive. The result is that the obligations, deriving from the various signatures, do not only differ but that they may depend on various national laws. I do not pretend that this is a satisfactory result. On the contrary, it is a bad one. But the remedy, in the silence of the laws, is not a fiction, according to which all the signatures, posterior to that of the drawer, should have inspired a confidence to be determined by the law of the place where the bill may have been signed by the drawer. The collectivity of the States could undoubtedly give a legal foundation to this fiction, but it can do a much better thing, it can equalize the laws and avoid the fiction.

Positive laws and ordinances. I am of opinion that the law relating to bills of exchange has originally been a universal customary law. But the codification in various countries and the doctrines of

the learned men have created many discrepancies, and, as the circulation of the bills of exchange remained universal, the discrepancies are detrimental to universal trade. Some laws — I may certainly quote the Englisch bills of exchange act — have tried to give more security to the application of the international law, in their own sphere of jurisdiction, by means of rules which solve the so-called conflicts of the laws. The collectivity of the States might undoubtedly equalize and bring to the highest degree of perfection such solutions of conflicts. But, however reasonable the interpretation of these rules might be, the existence of the different laws would remain detrimental, perhaps not to the judge but at all events to the business-world.

§ 61. *Torts and other prejudicial acts.*

Division of the subject-matter. I shall distinguish two categories of prejudicial acts. The first contains the acts which must be qualified as being *personal, imputable* and *unlawful or rather antisocial;* the second includes, without any further subdivision, the acts lacking one or more of the above-mentioned qualifications. As to the acts of the first category, the disturbance of the reasonable order of social life is so obvious, that a duty of indemnification may be considered as founded on an international-common rule, so that a localization is only necessary in order to determine the national law, which governs the particulars of the duty of indemnification. With regard to the second category, the duty of indemnification can only be founded on a positive national law, and this law can exclusively be ascertained by means of a localization.

The personal, imputable and antisocial prejudicial act. If the lawgivers had only enacted the general principle, an international-common law could gradually develop by means of the case-law in the various countries. But many lawgivers thought it right to limit the free judgment of the Courts. They have determined minutely in how far an act is to be considered as unlawful or antisocial in the sense of the law. They have also determined the conditions on which the qualification "imputable" depends, and in which manner the amount of the indemnity is to be calcu-

lated. Such legal particulars require a localisation or, after the classical method, a rule for the solution of the conflict by means of a reference to a law. Scientists and learned judges, sometimes even lawgivers, have tried to establish a rule which refers to a law. The opinions are at variance. Some jurists refer to the law of the place where the act was committed (*lex loci actûs*); others apply the national law of the Court (*lex fori*); a third group maintains that a duty of indemnification must be justified by both laws. I gave my opinion briefly in the beginning of this paragraph. The duty of indemnification is based on an international-common rule, and in so far no reference to any national law is necessary. Only with regard to the legal particulars a localization is necessary. Such a localization is often but not always possible. It is possible when the act, committed in a definite place, has disturbed the reasonable social order of the same place. In such a case the law of that place applies to the legal particulars of the duty of indemnification, provided that the indemnity is not greater than the damage. Indemnification is the only thing required, both according to the reasonable principles and according to the international-common rule; an indemnity which would be greater than the damage would exceed the domain of the civil law and bear the character of a punishment. If the act is not localizable, the judge will freely apply and construct the international-common rule. The collectivity of the States might go further than the State in its isolation, it might regulate the particulars of the not-localizable act. Such an evolution has been started with regard to the duty of indemnification, deriving from a collision at sea. In article 12 of the treaty, concluded at Brussels in 1910 September the 23th, a special localization is to be found.

The other cases. Such cases give rise to very interesting scientific disputes, but even scientific polemics I shall carefully avoid. According to many laws a person may be liable to refund the damage caused by another person, with whom the former is connected. Such connections exist, for instance, between parents and children, guardians and wards and employers and employees. Even the damage caused by an animal or by a thing, belonging to a person — a railway, a motorcar or

an airship, for instance — may be imputed to a person. A person who generally is not responsible for his wrongs, e. g a very young child or an insane individual, may be made legally answerable under special circumstances. In the law of a nation, a duty of indemnification may be attached to an act, which is not positively unlawful, for instance if a man has acted at his own risk or in a state of emergency. In all the above mentioned cases the judge will have to examine how great the reasonable extension of the range of his own national law may be. If the act falls under this range, the *lex fori* will be applied according to the command of the lawgiver. If the lex fori is not applicable to the case, a localization will be necessary to make a foreign law applicable. Even a double localization might be necessary, if a person is to be made answerable for the act of another person with whom the former is connected; both the act and the connection must be localized. The proviso that the indemnity may not be greater than the damage, applies here too, as has been explained in the foregoing rubric. If localization is not possible, a foreign law will not lead to a condemnation.

§ 62. *Other Sources of Obligations.*

Preliminary remark. There exist many sources of obligations of a special character and they certainly are a most interesting object of scientific investigation. But, as usually I shall follow the method of concentration. I shall discuss only a few sources. Two of them are of old nobility. They have been taken from the Roman law. The first is the payment without any legal duty to pay, the *condictio indebiti*, the type of the unjust enrichment. The second is the service rendered without any legal duty, the old *negotiorum gestio*. A third source is modern, viz. the *community of de facto interlaced interests*.

Payment without a legal duty to pay. I am placing this form of unjust enrichment on the foreground, because the obligation deriving from it is based on an international-common rule. Therefore the duty to refund must be admitted without necessarily referring to a law, only with regard to the particulars of the claim a localization is necessary. Other forms of unjust enrichment are not founded on an inter-

national-common rule, but only on a positive law, therefore a localization is necessary for a condemnation on the authority of a foreign law. As to the undue payment, I wish to point out that the negative qualification "undue" does certainly not require a general reference to a positive law, the entire international law of the obligations is to be taken into consideration. If the payment has really enriched the defendent unjustly and to the detriment of the claimant, the duty to refund the damage has an international-common basis. Localization, leading to the application of a positive law on the particulars of the claim, may be possible by means of the domicile or professional centre of both parties. The nationality of the parties will only then be a cause of the application of a definite law, when this is the spirit of the *lex fori*. If localization is not possible in a case covered by the international-common rule, the judge will freely apply the international-common rule. As to the cases which do not fall under the international-common rule, localization will be the only way which leads to the application of a foreign law.

Service rendered without legal duty. I shall not maintain that it would be absolutely impossible to establish an international-common rule, which might at least lead to a duty to refund the costs made by the man who rendered the service, but the international-common germ has been hidden under the positive rules, just as an old trunk may be concealed by thick ivy. Therefore a localization is always necessary here to justify the application of a foreign law. Localization, as it is usually, is often but not always possible. If both parties, the claiming *negotiorum gestor* and the defendant to whom the service has been rendered, have their domicile or professional centre in the same local sphere of social life, or even if the claiming *negotiorum gestor* has performed a professional act in the sphere of his professional centre, localization is possible. In cases where it is not possible, a foreign law will not lead to a condemnation. Such a state of things would be detrimental to international social life, if the *negotiorum gestio* would really be a daily occuring juridical fact, and an interference of the collectivity of the States would then be necessary, but in general

the importance of the *negotiorum gestio* is only great in theory. In special cases the contrary may occur, as we see in a matter, which does not entirely coincide with *negotiorum gestio*, but which is of a similar nature, viz. the matter of salvage. Here too a special localization is to be found in the Brussels treaty of 1910, concerning salvage at sea.

Communities of interlaced interests. This is a very interesting subject-matter. As a rule, such communities are not contractual, they exist *de facto* as a source of legal obligations. I have in view joint ownership in general, the state of heirs or legatees jointly entitled to the same estate or good, the community of merchants whose goods have been loaded in the same vessel, the community of creditors in a bankruptcy, and even that of the holders of debentures which belong to the same loan. Such juridical relations may have their international side. The benevolent reader will allow me to leave the application of the principle of localization to him. I beg to quote my former work again, and I hope it will be for the last time in this work. An old form of interlaced interests is the *general average*. Its literature is rich. I beg to remind the reader that two opinions are opposed to one another. According to the first, the law of the flag of the ship governs the obligations derived from jettison and other causes of general average; according to the second the law of the harbour, in which the community ends, is applicable. In this opposition I see an attempt to come to a localization.

Fifteenth Section.

THE INFLUENCE OF TRADE ON THE EVOLUTION OF PRIVATE INTERNATIONAL LAW.

§ 63. *The broad and the narrow Sense of commercial Law.*

The broad sense. In its broad sense, commercial law is nothing else than the general civil law applied to matters of trade. It is by no means a distinct part of the civil law, containing special rules applying to *traders, only because they are traders*, or to

commercial juridical relations, only because they are thus qualified.

The narrow sense. In its narrow sense, commercial law is a distinct part of the civil law, containing special rules applying to traders, as such, or to commercial juridical relations, also as such. Sometimes a law contains a special commercial procedure, which differs from the general civil one. In some laws bankruptcy is a part of the distinct and special commercial law, but in a system of international law it is much beter to devote a separate section to bankruptcy.

§ 64. *Commercial Law in its broad Sense.*

The evolution, tending to international unification. In its broad sense we find in the commercial law many institutions, which have developed almost on the same basis in the laws of all the nations. Deeply rooted national customs are not to be found here, and many impediments which are obstructing the way of an evolution of the civil law, lose their power of resistance with regard to trade. As to the subject-matters which are fit for an international equalization, I will mention the bills of exchange, carriage in all its forms, certain parts of the law of companies. Even insurance might be added to this series.

Is an international commercial code desirable? Some chapters of such a code are nearly ready, for instance those concerning bills of exchange and maritime trade. If the reef of the narrow sense of commercial law could be avoided, the elaboration of a commercial code for the world would be desirable, at least as a transitory measure.

Relations between branches of trade and the public powers. Trade is essentially an individualistic even an egotistical profession, but notwithstanding this, perhaps even on account of its egotism, a movement tending to "socialization" of extensive branches of trade is going on. The States have become bankers, carriers, insurers etc. In the beginning the undertaking of a State may also be expected to bear an individualistic, even an egotistical character, but it seems probable that quasi-commercial partnerships will unite two or more States, and that at the end a universal centralization may be neces-

sary. I should think that we have time enough to consider the matter maturely.

§ 65. *Commercial Law in its narrow Sense.*

Synopsis of the international side of the matter. In many countries there is a commercial law in the narrow sense of the expression. Such a law has developed in an historical way. It has been an inducement to many improvements, but in our days it has lost its progressive character. Important questions of international law are connected with it. The first question concerns the quality of trader, which is to be attached to a man, or of commercial association, to be attached to an association. The second relates to the commercial character of a juridical relation. Questions of the above-mentioned nature may be decisive in a law-suit. The questions are generally given the form of a conflict of laws, which is to be solved by a reference to a law governing the qualification of "trader" or of "commercial relation."

The qualification of a man as a trader or of an association as a commercial one. The question put in the form so dear to the classical doctrine of the conflicts of laws, runs as follows:

"Which law governs the commercial qualification of a man?"

In the daily language, it is as easy to qualify a man as a trader as it is to call him an artist or a learned man. But as soon as the law attaches the application of a distinct code or system of rules to the quality, it is necessary to determine minutely in the law, which external signs make a man a trader, an artist or a learned man. With regard to the quality of trader, the laws do not differ to any very important extent, but the difference is great enough to make the winning or the losing of a law-suit depend on the application of a definite law. Hence the above-mentioned form of the question, in the works of many learned predecessors. The learned men do not agree. According to the opinion of some of them the law which governs the case, at least when the question is simply how a man ought to be qualified, is the law of the place where he carries on his business, or if he does so in more than one place, the law of the place where is his principal establishment. Other scientists promote the application

of the national law of the man. A third category of text-writers upholds the authority of the national law of the Court, before which the question is brought; according to the views of the supporters of this third opinion the matter should be a question of "public policy". I dare say that the mistake lies in the wrong way in which the question is formulated. Here we have to deal with a matter of positive law, the solution of which by no means depends on a reasonable principle. Therefore it is useless to go in search of a supranational rule, which might solve a conflict between laws. The question ought to run: "Which range has to be given, by a judge, to his own national law in our matter?" and in so far as a question does not fall under the range of that law: „Which effect has to be given by the judge to the law of a foreign State?" The questions are more complicated than the one quoted in the beginning of the rubric, but the method of the formulation is better. If the man, whose quality is questionable, is carrying on business in the country, where the judge is sitting, and if that man shows the external signs of a trader in conformity with the same law, the judge will most probably treat the man as a trader. On the other hand, if the juridical relation, on which a law-suit is based, must be considered as localized in a foreign country, the judge will most probably give to the law of that foreign country the importance it deserves in casu, especially if the man, whose quality is questionable, has his professional centre in the same country. In this way, the investigations of my learned predecessors are not entirely deprived of practical value. Even the appeal to "public policy", which may seem strange in a matter of simple qualification, appears to be an indirect way leading to a reasonable result, viz. the application of a local law, by the local judge, to a juridical relation which belongs to the local sphere of social life.

The qualification of a juridical relation as a commercial one. To a great extent, the considerations developed in the previous rubric also apply here and I shall only detain the reader for a moment. The commercial quality of a juridical relation may depend on the quality of the parties or on that of one of them; in such a case the quality of the persons must be ascertained first. It may also be that the relation

is qualified by a law as a commercial one, independently of the quality of trader which is granted to a person; in such a case the relation must first be localized, if possible, and the application of a foreign law will depend on this localization.

Expectations for the future. The matter of the present paragraph, however interesting it may be as an intellectual training for an international jurist, is not founded on reasonable principles, which can be the final aim of an evolution. Therefore, I do not expect a real evolution of the commercial law, when taken in its narrow sense, but only a disappearance of the narrow rules. A beginning has already been made. The distinction between commercial and not commercial companies disappears in modern laws. The means of evidence, admitted in so-called commercial law-suits, are more and more admitted in civil law-suits too. The establishment of special commercial courts has even become contestable. In old times, the extraordinary procedure before the special commercial courts was a cheap and quick one, compared with the ordinary civil procedure; in our days there is a tendency to change the extraordinary commercial procedure into a general civil one, as there is no reason why civil procedure should be expensive and long-winded.

Sixteenth Section.

SUCCESSION.

§ 66. *General Views.*

Philosophy of the law of successions. The law of successions is closely connected with the family law and the law concerning goods. In the law of successions we shall find the same contrast between individual and society, which we have found in the connected parts of the civil law. An individual has in principle the free disposition of his goods by means of a will, but society imposes many restrictions. The form of a last will is often minutely regulated. With regard to the contents of a will, many laws have thought it fit to limit the liberty of the testator, in the interest of near relations, of the surviving con-

sort etc.; sometimes the nature and the situation of the goods are taken into consideration by the lawgiver. If a man dies without leaving a lawful will, universal custom grants the nearest relatives the right of succession, but every lawgiver has regulated the rights of the heirs in his own way. It may be that, in countries where marriage creates a patrimonial community between husband and wife, the death of one of the consorts is influential both on the dissolution of the matrimonial community and on the inheritance of the deceased. The right of the surviving consort, as a legal heir, is not regulated everywhere in the same way. The deceased may have left illegitimate offspring behind, beside legitimate children and other legitimate relations. Especially with regard to such a state of things, the laws are at variance. Moreover, the general system of each law has been elaborated, not only under the influence of social-philosophy, but also under that of scientific disputes concerning the nature of a succession. The succession may be considered, in theory, as an acquisition of the entire fortune of the deceased by the mere force of the law, without interim; a continuation of the juridical personality of the deceased by the legal heirs is even very often admitted. Another system, which widely differs from the one mentioned above, grants to the heir only a title to the beneficial interest of the estate of the deceased. Very often the succession to the deceased's immovable goods is regulated according to another system than that which applies to movables. A unification of the various national laws, concerning succession, cannot be a matter of serious consideration. Hence the State, acting in isolation, can only hope to establish, from its individual point of view, a relatively reasonable international rule, and even the collectivity of the States, as long as it must refrain from a unification of the greatest part of the law of successions, will only be able to bring a certain harmony in the application of the national laws.

The main questions in the old doctrine of the conflicts of laws. Very often the regulation of the succession of citizens domiciled abroad, or of aliens residing as "condottieri" or merchants in a country, was a source of juridical difficulties concerning the law, which ought to be victorious in the conflict. It may be useful to call

a moment's attention to the principal questionable points of the old time. They are still a matter of dispute in our days to a certain extent. In the beginning the learned jurists were all of the same opinion as to the succession to immovable goods. The law of the place of the situation was absolutely decisive; here, according to d'ARGENTRÉ, not even children were in doubt. Nevertheless the doctrine of the unity of the succession found very strong supporters afterwards. As to the succession to chattels personal, it was generally considered as governed by the law of the domicile of the deceased. In later times "nationality" became a rival of "domicile". A third matter of great importance in the ancient doctrine was the legal state of aliens; they were often subjected to *privilegia odiosa*, and were even deprived of the right to succeed.

Succession to immovables. In our days the ancient doctrine, according to which the *lex rei sitae* is absolutely decisive, has still many supporters. It is the established rule in England and in several other States. It is obvious that in these States the competition between "nationality" and "domicile" is only existing for the goods which do not fall under the category of immovable goods or of goods put on a par with immovable goods. In the Hague conference in which the matter was discussed, the idea of the unity of the succession domineered. But it found opponents all the same.

Nationality or domicile? There is undoubtedly a strong relation between the succession of a man and what I called his "personal law" and I beg to refer, in general, to the paragraphs 44 and 45. According to the opinion, which I have developed in the mentioned paragraphs, the principle of nationality is preferable to that of the ordinary domicile in the continental sense, but the best basis for the international succession law would be the principle of the domicile established *cum animo perpetuitatis*. As, however, an international agreement on the basis of the lasting domicile meets with formidable impediments in the present state of the national laws, the principle of nationality may be recommended as a transition. It would at least give a certain harmony. Such an international regulation requires the interference of the collectivity of the States.

The State acting in isolation, is obliged to choose between the three principles, viz. that of nationality, that of the ordinary domicile and that of the domicile, qualified as lasting on account of the *animus perpetuitatis*, and this choice determines the personal law of a man, from *the individual standpoint of a definite State.*

Privilegia odiosa of aliens. Before THE WAR they were on the verge of disappearing. THE WAR may possibly retard it. An evolution in the direction of the reasonable principles is not possible, because the institution is not founded on such principles.

Indication of some special points, to be discussed in the two following paragraphs. I shall try to show that a rule purporting that the succession of a man is governed by his "personal law", is only a general guiding thought and not a mechanical solution of the conflicts of the laws. In order to attain this end, I shall discuss the matters which can be found in nearly all the national laws relating to succession. That will do. A discussion of particulars, which are only to be found in some laws, would lengthen my work, without being of any proportional use. The particulars I am thinking of are manifold. I only beg to mention the agreements relating to a future succession or to the repudiation of such a succession, the collective wills drawn up by several persons, the ever-lasting settlements the regulations tending to prevent a division of rural establishments etc..

§ 67. *Indication of the Successors.*

Succession ab intestato. Apart from the doctrine, according to which the *lex rei sitae* governs the immovables, there is certainly a close connection between the indication of the successors and the „personal law" of the deceased. But, even when the tacit will of the deceased is to be searched for, there is no decisive reason to take only his national law into consideration. As the expression "personal law" is open to three various interpretations, it is obvious that the application of the law, in the juridical community of mankind, is in a chaotic state. Neither the doctrine of the "pointing back" nor that of "public policy" are able to rectify it. An international

agreement purporting that the successor would have to be indicated by his national law, for the entire estate of the deceased, would in any case be a measure of transition, implying a momentous progress. Such an agreement has been elaborated in the Hague Conferences concerning the law of successions as a part of private international law.

The State as an eventual successor ab intestato. I am not thinking of the fiscal rules, discussed in § 17. It would not be of any use either to dwell on the political-fiscal rules, according to which the State should be coheir in every succession. I only have in view the right which is to be exercised by the State, in case that there is neither an heir instituted by a will, nor a relation called to the succession *ab intestato*. The noteworthy particularity of the case is that it clearly shows that a reference to the "personal law" of the deceased can only be a guiding thought. The solution of the question, which has been asked here, depends on the nature of the eventual right of the State, and that nature is questionable. In the opinion, according to which the State is a true heir of the deceased in such a case, at least with relation to movable goods, the State, the law of which is the personal law of the deceased, must occupy the position of an heir *ab intestato*. If, however, the State, as the local sovereign, is entitled to *masterless goods*, the State, on the territory of which a good is to be found, will become its owner, or at least it will be entitled to the beneficial interest of such a good, after having paid the debts which are clinging to it. It is not always easy to determine the exact situation of an incorporeal good, of a claim for instance. Besides, the juridical situation of the creditors of the deceased may be a delicate one, even when all the States concerned are trustworthy. An international agreement which settles the point is desirable. An attempt to come to such an agreement would not meet with invincible impediments. It was nearly attained at the Hague.

Form of the last-wills. Here the "personal law" of the testator is not either the only matter to be taken into consideration. In § 42 I have briefly discussed the celebrated rule *locus regit actum*. But even if the interpretation, according to which the sense of "regit"

should be a facultative one, could be considered as an established universal interpretation, the question of the form of a will would not yet be solved entirely. In that case, the form, established by the law of the place where the testament is drawn, would undoubtedly be sufficient, but in many national laws we find explicit provisos, relating to testaments drawn abroad by the own subjects of the State. It may be that the national law leaves it to the own subjects of the State to choose between various legal forms. It may be also that the law has enacted that the own subjects, dwelling abroad, are at liberty to make a will in a form, which is not admitted as a legal one by the law of the country where the will is made. It may be, finally, that a national law has enacted that, when subjects of the State make their will abroad, the use of a special form is prohibited to these own subjects, even when such a special form is admitted as a legal one by the law of the place where the will is made. It is obvious that the judiciary in a State will cling to the law of its own State, concerning the own subjects abroad. A Court will by no means consider the case as a classical conflict of laws, but only as a contrariety between a national law and a foreign one, a state of things which cannot be a matter of doubt to a national Court. But as foreign Courts, of course, are bound to obey the law of their own country, a will might be considered as valid in one country, and null and void in another. Properly speaking, a law which pretends to govern absolutely the form of the wills drawn up by the own subjects abroad, even when these subjects are domiciliated abroad *cum animo perpetuitatis*, is exceeding the reasonable limits of its sovereignty. This may be said frankly, but it is not easy to come to an international agreement. I beg to refer to the literature concerning the Hague conferences.

Construction of wills. I am inclined to say that there is only one reasonable rule, which governs the international relations connected with the matter, viz. the rule that a Court must wisely construct the terms of a will and take all the circumstances of the case into consideration. The legal provisions, concerning the interpretation of a will, are an object of interpretation by themselves. A

Court, besides, is bound to apply the injunctions of its own lawgiver, but no foreign law can force it to admit a construction which is inconsistent with reason. It is clear that, when the testator has made his will personally in his mother-language, his national law will exercise a reasonable influence. The collectivity of the States might undoubtedly frame interpretative rules which would be universally binding. I beg to say that here silence is golden.

The absolute capacity to make a will. This absolute capacity, of course, is in contrast with the relative capacity to favour definite persons or to dispose freely of the entire estate. As to the absolute capacity, the reference to the "personal law" of the testator will be a reasonable guiding-thread. But apart from the various interpretations of the expression "personal law", the divergences of the national laws raise a question, which shows again that the reference to the "personal law" is only a guiding thread. There may be a change of the elements of the expression "personal law", e.g. a change of the nationality or of the domicile, between the moment of the making of the will and the moment of death. It is obvious that a long space of time may lie between these two moments. There is no established customary rule. An absolutely reasonable solution would require a unification of the laws, but as long as this seems unattainable, a rule maintaining the validity of the will, as far as possible, would be relatively reasonable. Such a rule could at least be framed with regard to personal qualities, which influence the capacity. In countries where the law is silent, the case-law might prepare an international-common rule.

The absolute capacity to inherit. As to corporations and similar bodies, I beg to refer to the paragraphs 40 and 46, and I confine my observations to natural persons. Apart from the legal provision relating to the settlement of special funds by means of a will, we find in many laws a general rule, according to which, a person, in order to be the successor of another person, must exist at the time of the death of the latter. He must exist already or he must still exist. This seems to be a thing which goes without saying, but in reality it is not so. To begin with, there is an old rule, confirmed by the

international-common law, which purports that a child procreated, but not yet born, is considered as an existing juridical subject, if his interest is to be considered as such. The laws are at variance within certain limits with regard to the legal duration of the pregnancy. But there are more discrepancies. According to some laws it is sufficient that the child is *borne alive*, other laws required the *vitality* of the child to be certain, whilst a third category has established the condition that the child *must have lived* for a definite number of hours after its birth. Such variances are arbitrary, but, if it is necessary to refer to a law, I should be inclined to apply the personal law of the child, and not that of the deceased. The matter has nothing to do with "public policy". The rights of the child, as a human being, are not questionable. The only question arising is the question whether the child, in its momentary life, has acquired an estate or a good, and transmitted it to the heirs indicated by its personal law. The best solution would be an equalization of the laws, and, in such a case, the system according to which it is sufficient that the child was borne alive seems the most reasonable. The same radical system of equalization seems recommendable when the exact moment of a person's death has to be fixed by a legal presumption. For the case that two persons, one of whom may be the heir of the other, or who may be reciprocally heirs of one another, have lost their lives in the same disaster, and no evidence of the survival of one of them can be given, some laws have established legal presumptions of survival on account of age or sex. Other laws have withheld from any presumption whatever, the result being that no transmission of the inheritance between the concerned persons will take place. If the two persons have the same "personal law" this law could apply, but in other cases there is no reason to refer to a law, and the result of the absence of any legal presumption will be the exclusion of any transmission between the persons concerned, a system which, according to my opinion, would also be recommendable as a basis of international uniformity. But I think I have detained the reader long enough with such dismal questions. There are more questions, connected with the absolute capacity to inherit. In general every living human being enjoys this capacity, but the reare

legal exclusions of entire categories of human beings. Such exclusions may be enacted in a State on religious or political grounds, or they may be attached as an accessory to severe punishments. I refer in general to the paragraphs 2 an 40. In the State, the law of which contains such exclusions, the Courts will yield to the legal command, but an effective collaboration to such abusive exclusions may be denied by other States, as we have seen in § 40. I have pointed out, in paragraph 66, that the *privilegia odiosa* of aliens were on the verge of disappearing before THE WAR. I beg to add that some States have taken into consideration the case that their own subjects should be treated unfavourably by a foreign lawgiver in the matter of succession. In order to restore the equality or to react upon unfavourable foreign laws, such States have framed special provisions, the construction of which may be questionable.

Relative incapacities. This expression embraces all the cases in which a special relation between the deceased and a definite person prevents the former from favouring the latter, or the latter from being the former's successor. There are many relative incapacities in the national laws, and the principal data of the matter are to be found in the publications of the Hague Conferences. Some incapacities exist both with regard to the succession *ab intestato* and to the testamentary succession. They are often qualified as "indignity". A striking example is the case of a murderer, claiming the estate of his victim as heir or legatee. Other incapacities are founded on a special relation between the deceased and a favoured person, for instance that between guardian and ward. Incapacities relating to the acquisition of immovables by succession are mentioned pro memoria. The whole matter of the relative incapacities again shows that a mechanical application of the "personal law" of the concerned persons is to be disapproved of. The social aim of every kind of incapacity must be taken into consideration. If the incapacity is relating to family-law, the personal law of the persons will be influential. If on the contrary the freedom of the testator must be maintained and the interference of the persons, who surround the testator during his last illness must be neutralized, the law of the place of the testator's domicile or even

that of the place of his death will be of importance for the decision. The *lex fori* may be influential too. A Court will never be inclined to assign the deceased's estate to a man, who has been condemned, as a murderer of the man whose estate he claims, in the country where the Court is established.

Limitation of the part of the estate to be disposed of. Not everywhere but in many countries the positive law has enacted limitations of this kind, which have been founded on the consideration that the interest of certain relations of the deceased coincides with public interest. In the countries where such limitations exist, and where nationality is the decisive element of a man's personal law, the Court will apply the legal limitations to subjects of the State, deceased abroad. In the country, where the deceased was established *cum animo perpetuitatis*, the limitations of his national law may, however, be disregarded. An appeal can be made to "public policy" on both sides. The matter is becoming more complicated still, when we suppose that the testator has been naturalized in the country of his domicile, before or after the making of his will. In the country of his origin, such a naturalization may be considered fraudulent. A universal admission of the principle of nationality would not even solve the question satisfactorily. Equalization of the laws is almost unattainable, on account of the relation of the matter with the national organization of the family. As long as the laws are so widely different, it seems impossible to execute a symphony with such discordant instruments.

Hereditatis petitio. I use the latin name, in order to include both the case of a man claiming to be recognized as heir or general legatee, and the claim, tending to a grant of administration or to the beneficial interest. The main point is the jurisdiction for the claim. It is a delicate question, which cannot be solved entirely by a State, acting in isolation. I must add that even the collectivity of the States would be unable to do so in a fully satisfactory way, as long as the succession-laws have not been equalized to a great extent. The centre of the fortune of the deceased is, of course, at the place of his domicile, especially when such a domicile has been established

cum animo perpetuitatis. During the life of the deceased, the Courts of the country, where such a domicile is, have undoubtedly had jurisdiction for personal claims of the creditors of the deceased against the latter. And as a logical consequence of this basis of jurisdiction, the law generally grants jurisdiction and competency, for the *hereditatis petitio,* to the Courts of the place where the deceased had his last domicile. On the other side, a grant of jurisdiction to the Courts of the State of which the deceased was a citizen, may exist in the countries, where the principle of nationality governs the succession. A third basis of jurisdiction may exist as to immovables, in the country where the goods are lying. And even with regard to movable goods, which are a security for the personal debts of the deceased, the Court of the place, where the goods are lying, may be inclined to interfere in order to protect the creditors. In some countries an adjudgment in bankruptcy may be made with regard to the estate of the deceased, and, for such an adjudgment, the domicile is the logical basis of jurisdiction and competency. When the inheritance is worth while and the heir-claimant has able councillors at law at his disposal, the difficulties will easily be overcome in practice, but it is not easy, for the States, to establish a satisfactory international regulation of the jurisdiction. The Hague conferences have been fully aware of the difficulty of the matter.

Accepting and repudiating of the quality of successor. The right freely to choose either is generally granted in our days, but the theoretical differences of opinion, with regard to the nature of the title by succession, both influence the form and the legal effect of the decision of the heir or legatee. The scientists may be expected to agree finally, but a mere reference to the personal law of the deceased is not a good basis for an agreement. The successor must be able to exercise the rights, which are generally granted to a successor by the law of the country, the Courts of which have jurisdiction for the personal claims of the creditors of the deceased. He must be especially entitled to the *jus deliberandi* and to the *beneficium inventarii.* He must be also obliged to fulfil the duties, generally imposed upon a successor by the same law. As long as the above mentioned

theoretical differences will exist, it will be very difficult to come to an international agreement.

The acquisition of rights on the separate goods, included in the estate. The principle that the entire estate, as a collectivity of goods, is acquired in accordance with a unique law, is not admitted everywhere, and if it is admitted the application is not always the same. Difficulties may arise in practice, when the goods included in the estate are lying in various countries. But I am of opinion that a guiding-thought may be found, in the silence of the laws, by making a distinction between the general title of an heir or legatee, and the special title of owner of a separate thing. As to the first title, the personal law of the deceased will generally be decisive, whilst, with regard to the second title, the law of the local sphere of social life, to which the separate good must be reckoned to belong, will exercise its influence to a reasonable extent. In this way practice will be able to prepare an international-common law.

§ 68. *Adjustment of the Estate of the Deceased.*

Successors and creditors of the estate. In general, I beg to refer to the foregoing paragraph. It is obvious, that the application of the personal law of the deceased to the relations between successors and creditors, can only be made with so many exceptions, that the rule collapses. I beg to remind the reader of the jurisdiction of the Courts of the country of the last domicile of the deceased. The protection to be granted to the creditors of the deceased by the same Court, a protection including the appointment of a legal administrator or even an adjudgment in bankruptcy of the estate, also ought to be born in mind. I must mention here the provisions of positive law, granting certain powers to the consul of the nation, to which the deceased belonged, with regard to the administration and the adjustment of the estate. In the draft-treaty, elaborated at the Hague, the interference of the consuls is admitted. I am of opinion that, in ordinary circumstances, the interference of an authority as the consul may be useful, especially

if the principle of nationality governs the succession, but in cases where the interference of the local courts and judges is necessary for the protection of the local creditors, the power of the consuls may come in opposition with the local sovereignty.

Executors and trustees. The appointment of executors, in the narrowest sense of the word, is certainly a measure which is in accordance with the liberty, generally granted to a testator. But some positive laws grant such extensive rights to the testator that he is able to give, let us say, an eternal effect to his last will. The testator is, in such a case, entitled to place his entire estate, or a part of it, onder the continual administration of executors or trustees, and to deprive absolutely and for ever the heirs or legatees of their freedom of disposition. In other States such an immobilization and inalienability of goods is considered as being adverse to a local social interest. Such a local social interest does not coincide with the classical principle of "public-policy", an expression which I always avoided on account of its vagueness. Without appealing to the said classical principle, the Courts of the country, where corporeal goods, especially immovables, are lying, will undoubtedly obey the laws of their own country, and construct these laws in conformity with the reasonable intention of the lawgiver. The differences that exist in the laws with regard to the liberty of the testator are so great and so deeply rooted, that it seems impossible to equalize the laws, or even to obtain an agreement containing a reference to the personal law of the testator. The juridical world must here be taken as it is.

Juridical relations between coheirs. Generally speaking, we have to deal here with a community of interlaced interests, which is a source of reciprocal duties and rights for the co-partners. Such a community may be localized, and in this way it may be possible to give to the personal law of the deceased the reasonable influence, which it deserves, on the relations between coheirs, without a mechanical application. I warn against a mechanical application, because neither the jurisdiction for the allotment nor the allotment itself are entirely depending on the personal law of the deceased. This is very obvious with regard to the obligation of collaborating to a partition, an obligation

the source of which is the community de facto. According to some laws, the testator has the legal power to exclude, either indefinitely or at least for a long period, the dissolution of the community between the co-heirs, and to maintain a perpetual or nearly perpetual undivided condition. Other laws have considered such a compulsory perpetual link as adverse to the social interest, the exclusion of the partition by the will of the testator being only allowed there for a short period. It is clear that in the latter country, the Courts will apply the national law on goods, especially immovables, which are lying in the country. With regard to the allotment, the personal law of the deceased governs the parts of the co-heirs and the mutual accounts and clearings. But there are many questions involved in the partition of the estate of the deceased. I have in view the juridiction, the capacity of the parties, the forms, the protection of absent co-heirs, the rights of the creditors of the deceased, the nature of the goods, the warranting of the existence of rights on the goods, the acquisition of absolute rights on separate goods etc.. I beg to avoid a circumstantial discussion of all these points, but I wish to emphasize that a general reference to the personal law of the deceased is only a mechanical suppression of the difficulties and by no means a reasonable solution. An equalization of the laws does not yet seem possible, but international regulations, in the spirit of the Hague draft of a treaty, would be beneficial. The practice would then be able gradually to form an international-common law.

Seventeenth Section.

CIVIL PROCEDURE.

§ 69. *Questionable Points in the international Law of civil Procedure.*

Jurisdiction. The question of jurisdiction has been discussed in the first part of the system (§ 35), and it is only called to memory here, because of its practical importance in the matter of the execution of foreign judgments.

The antique distinction between "institutoria litis" and "decisoria litis". A very old doctrine has introduced a distinction between the *institutoria*, the rules concerning the course of the judicial proceedings in the narrowest sense, and the *decisoria*, the rules leading to a decision in the contestation between the plaintiff and the defendant. The first subject-matter must be regulated, according to the old doctrine, by the *lex fori*: the second by the national or foreign law governing the right which is the object of the contestation. The distiction is, in my opinion, a most remarkable historical monument, and I have always considered it as a valuable thing, but it must not be handled as a mechanical solution of conflicts of law, so that the only question arising would be the question whether a rule is either an *institutorium* or a *decisorium*; the old doctrine is only a guiding-thought, not releasing us of the duty of carefully analysing the nature of a rule and its relation to the reasonable order of social life. Such an analysis, for instance, is necessary with regard to the evidence or to the limitation of actions.

Notice to absent defendants. Superficially examined this question can be easily solved by referring to the *lex fori*, according to the antique doctrine. It is an *institutorium*, and *prima facie* one should say that the performance of the formalities, required by the *lex fori*, is entirely adequate. From a higher point of view however, the said solution is a mechanical one, and only satisfactory from an egoistical standpoint. It is a requirement of the reasonable order of international social life that nobody should be considered as regularly summoned to the bar of a Court, without having received due notice, if not personally, at any rate in such a way, that the claim must, reasonably spoken, have come to his knowledge. There are many ways to give reasonable notice to a defendant residing abroad, viz. a commission to a foreign official, a notice by a diplomatic or consular authority of the country where the Court is established, or even, as the Post, in time of peace at least, is so reliable, a registered letter, delivered to the post by an official. The positive laws however have very often paid more attention to the facility of the plaintiff, being a subject or at least a person domiciliated in the country, than to the reasonable interest of a defendant domiciliated abroad. Sometimes the delivering

of a copy of the summons at the office of the crown-prosecutor, in the country where the Court is established, is sufficient. The Hague treaties, relating to the civil procedure, have tried to organize a very reliable system, but the official construction of the treaties is that this system is only facultative, so that the national laws, admitting a less reasonable system, remain in force. This whole question is not merely a theoretical one, it is closely connected with the matter of the execution of foreign judgments A further evolution will be necessary.

Aliens as plaintiffs or defendants in national Courts. It is not at all contrary to the reasonable principles that the fact that the plaintiff or defendant is a non-resident, should lead to special measures, for instance, if the plaintiff or eventually the counter-claiming defendant is domiciled in a foreign country, to the legal obligation to give the security for the costs, often inaccurately called *cautio judicatum solvi*. But many laws have only charged aliens with the said obligation. I must add, without discussing any particulars, that the laws have sometimes imposed many other *privilegia odiosa* on aliens, being parties in a law-suit before the home Courts. Such prescriptions are adverse to the reasonable principles. They are, they were at least before THE WAR, on the verge of disappearing. The Hague treaties had nearly given the finishing touch to this disappearance. I do not speak here of an evolution, because prescriptions, so absolutely contrary to the principles, can never evolve, but only disappear.

The right of being a party in a law-suit, „persona or jus standi in judicio". I use the latin expression in order to have a better contrast with the subject matter of the following rubric: *modus standi in judicio*. As to the question of the quality of a subject of civil rights, and also with relation to the status and the capacity of persons, I beg to refer to the §§ 40, 45 and 46. I only wish to observe that, in practice, the Courts are wise enough to handle the reference to the "personal law", of a juridical subject being a party in a law-suit, not as a mechanical solution of a conflict of laws, but only as a guiding-thought, not releasing the Courts of the duty of carefully analysing the circumstances of the case. If one of the parties is a person who is reasonably requiring the special protection of the

Court, an infant or a lunatic for instance, the Court will certainly grant him full protection as is it admitted by the *lex fori*. If on the other hand a party is appealing, in a way considered as unreasonable in the circumstances of the case, to a foreign law as her personal law, to her incapacity as a married woman for instance, it is not impossible that the local Courts will disregard such incapacity. In the same spirit we sometimes find a prescription in positive law stating that an alien, although he does not possess the *persona standi in judicio* according to his personal law, will be considered as fully capable in the home Courts, if he is capable according to the *lex fori*. This is too strong a reaction against the foreign law, but I do not criticize the positive law, I have only to ascertain its existence. Prescriptions, as the above-mentioned, are not really an evolution.

In what manner a party has to appear, "modus standi in judicio". A very easy question is immediately to be separated from a difficult one. If according to the *lex fori* a party is to be represented *in judicio* by an attorney, there is no doubt that an alien has to be represented also in that way. This is certainly a pure *institutorium*. A real difficulty arises, when it is necessary to decide, in special cases, who will have to appear as plaintiff or defendant. The special cases I have in view are, in the first place, the case of foreigners, being infants, lunatics or other similar persons, incapable of acting on their own behalf, and in the second place the case of foreign corporations, companies etc.. I am inclined to say that a natural person or a corporation, making their appearance before a Court as plaintiff or as defendant, are disposing of the civil right being the object of the law-suit, and that, therefore, the manner in which the foreign person has to make appearance *in judicio* must be the manner in which, in the ordinary course of affairs, a disposition of such a right on behalf of the person must be made. I only wish to add that such a rule must not be handled mechanically, and that, when the juridical relation between parties is localized in the country where the Court is sitting, it will be sufficient to comply with the *lex fori*. It must be observed, however, that the opinion that the *lex fori* applies to the manner of appearance in every case, has found many supporters. I do not agree

with them, and beg to remind the reader that although the matter in discussion may be called an *institutorium*, this qualification is not decisive. It will not be easy to come to an international harmony here, but gradually the decisions of the national Courts might establish an international-common law.

The limitation. I have discussed the matter in § 43, and I only wish to point out here that, although the application of a statute of limitations may be a *decisorium*, the *lex fori* is not without influence.

§ 70. *Evidence and its Production.*

Evidence as to foreign law. This is a well-known question, and it is clear that it may also arise with relation to colonial laws in a colonial empire. Two entirely contrary views have been developed here. According to the first, the existence of a foreign law is no more an object of evidence than that of an inland law; *curia jus novit*. The supporters of the other view, on the contrary, are maintaining that the existence of a foreign law is a fact, the evidence of which must be produced as well as of any other fact. Sometimes, the not always justified presumption is even admitted, that the foreign law, by lack of evidence of the contrary, should be similar to the inland law. I should modestly think that a reasonable principle can be pointed out here, but that the juridical world is not ripe enough to have it carried out in practice. I am of the opinion that, in theory, the doctrine "*curia juri novit*" is in conformity with the reasonable principles, as it is a duty of the State to administer justice, but, that on account of the juridical state of the world, parties are acting *de facto* as if the other doctrine were the exact one. In practice many means have been applied to facilitate the evidence, viz. statements of foreign authorrities and verbal or written advices of foreign learned men. Sometimes, as the reader will know, a legal system of official statements has been established, especially with relation to colonial laws. The necessity of a construction of the foreign law removes, to a great extent, the disprepancy between the two above-mentioned doctrines. The Court may have a complete library at its disposal, a library containing the

official collections of the laws of all the countries, the records of all the Courts, and the books of all the text-writers of our planet, but only a real Super-Court could find its way in that labyrinth, consider all the reversals of doctrines and construct a text, often written in a foreign language, as it ought to be done. Sometimes even a temporal question is mixed with a local one. As deputy member of a Court, I have once had to ascertain which civil law had been in force, about the middle of the XIXth century, in an African colony of Portugal. The difficulties, connected with the evidence as to foreign laws, could decrease by means of a gradual unification of the civil laws, and the doctrine *"curia jus novit"* would then most probably prevail at last, but the evolution will undoubtedly be a very, very slow one. Most valuable attempts to come to an international agreement concerning official statements have been made by learned men, but till now no general result has been attained. The question of the construction of foreign statutes or customs will not easily be solved. I beg to point out, at the end of this rubric, that there is a question, which to a certain degree is connected with that of the evidence as to foreign laws. In many countries there is a central Court of revision or cassation, exercising a right of supervision over the judgments of the local courts, in order to insure the uniformity of the application of the laws, and in the practice of such countries the question may arise, whether the non-application or the defective application of foreign laws may be an inducement to cassation or revision. I am inclined to say that, generally speaking, an affirmative answer should be given, but the question does not arise in a general form; in practice the solution must be deduced from a construction of the national laws relating to judicature.

Evidence as to facts. The question of the burden of the proof is only mentioned here in passing. Certainly it is a magnificent matter, but it is, in its generality, a question belonging to the science of jurisprudence, as a common good of mankind. The question to be discussed here, according to the plan of this system, is the evidence of a fact, which took place in a foreign country. The first thing to be emphasized here is that, in the ancient learned works on the conflicts of laws, we

also find a remarkable distinction between the manner of administering evidence, *the ordo probationis*, as the authors called it, and the admissibility and conclusive force of the various means of proof; the authors are speaking, in contradistinction with the *ritus* or *ordo probationis*, of the *substantia*. As to the *ordo probationis* the conflict was solved by referring to the law of the Court before which evidence had to be given, the *lex fori* according to a shorter latin expression, whereas the substantia, viz. the admissibility and conslusive force of the means of evidence, should be decided by the inland or foreign law governing the juridical relation between the parties, according to the so-called general principles for the solution of the conflicts of laws. When a contract concluded in a foreign country had to be proved, this would generally lead to the application of the law of the region where the fact, to be proved, had taken place. The old rule, according to my opinion, is correct and useful in modern practice, provided that it should not be handled as a mechanical solution of a conflict, but, as I had the opportunity to say more than once, as a guiding-thought, without giving up an investigation of the reasonable sense of the *lex fori*. As to the positive law, I must point out that only the first and simplest part of the rule, the part relating to the *ritus probationis*, has acquired the authority of an international-common law, whereas the second part is not generally admitted. Two opinions are in conflict here. According to the first, it is correct to refer eventually, with regard to the admissibility and the conclusive force of the means of evidence, to a foreign law, for instance to the law of the region wherein a relevant fact took place, whereas the second opinion emphatically maintains the doctrine that the whole matter of evidence is governed by the law of the Court, the *lex fori*. According to the method I follow in this work, it is my intention to examine, after having contrasted the reasonable principles and the positive law, if there is an evolution in the direction of the principles, and if such should not be the case, what may be the impediment on the way of evolution. I think I shall be able to show it here. I wish to place on the foreground that evidence is more a matter of logic and common sense than of application of a positive law. Parties must ascertain the existence of actual facts,

which existence will convince the judge that the fact to be proved happened in the past. The actual facts which are able to lead a Court to a conviction have been determined by a continual experience of the world. The fact, that has happened in the past, may have left visible traces on a paper, or psychical traces in the memory of witnesses. A wise man may also induce from a fact which has actually been proved or confessed or which is altogether undeniable, that another fact, logically connected with the first, has happened in the past. The truth is that the admissibility and the conclusive force of the various means of evidence do not need a fixation in positive law. But many lawgivers, believing that they are much wiser than the judges, have tried to fix minutely, in the terms of a statute, the admissibility and the force of the means of evidence. They have restricted or even excluded evidence by means of witnesses, for instance; sometimes even the law has forced the judge to consider a fact as established as soon as some legal conditions have been fulfilled. So we see that some laws are giving the judge a great liberty in the matter of evidence, whilst other laws have a compulsive, even a tyrannical character. There are degrees of liberty, not so many as in a Fahrenheit-thermometer above the freezing-point, but there are enough. And now we are in possession of the key. When the laws are granting the Court such a degree of liberty, that the Court is able to consider reasonably all the circumstances of the case, even the foreign laws in force in the region where a fact took place, the Courts will admit very easily that the evidence is regulated by the *lex fori*. When on the contrary, the lawgiver has jammed the Court in a tyrannic system of evidence, the Court tries to escape the tyranny of the *lex fori*, by means of a reference to a foreign law. The impediment of the evolution is therefore the compulsive character of some of the national laws, relating to evidence in civil matters. If the lawgivers would cease to mistrust the Courts of their own country, the international jurisprudence would be able gradually to constitute a common law and to use the antique and valuable rules of the past, not mechanically, but as a reasonable introduction. As to the practice in the Netherlands, the United Kingdom, the United States, etc., I beg to refer to the literature.

Commissions to foreign courts for the taking of evidence. It will be sufficient here to mention the customary or written rules relating to the matter. The Hague treaties on civil procedure have enacted very valuable regulations, especially about the examination of witnesses in foreign countries; many difficulties may arise in the practice, but the evolution of the positive law is regularly proceeding.

§ 71. *Foreign judgments and Arbitral Awards.*

Preliminary remark. Many comprehensive and able treatises have been written on the matter. I am paying the modest homage of a disciple to their authors, but I shall not try to summarize the scientific materials collected by the text-writers. It will be sufficient, for the sake of the actual work, to put these materials to my usual test.

The various legal consequences of a foreign judgment. The main consequences are: the force as a means of evidence, the fixation of a contested right or status, and the enforcement of the condemnation. As to the first consequence, I beg to refer, in general, to the foregoing paragraph. The foreign sentence, duly sealed, authenticated and legalized, is a proper evidence of its own existence and contents. It may also be considered as an evidence of the fact, that the foreign Court has heard, seen or done, what the record says the Court to have heard, seen or done. With regard to the significance of the foreign sentence as a conclusive evidence of the facts, which after a thorough investigation have been considered as being proved by the foreign Court, there is no fixed international rule; it may be that the inland Court will be able to admit the foreign sentence as a conclusive presumption of the truth. The two other consequences, the force as *res judicata* and the basis for a compulsive execution, are not always coinciding, and the first consequence may certainly exist without the second, but they may be joined here, as, for both, the main point is the jurisdiction of the foreign Court, that pronounced the sentence.

The reasonable principle. An old, but not venerable doctrine, to all intents based on absolute territorial sovereignty and egocentric selfishness, is considering as a logical sequel of postulated principles,

and therefore as a *strictum jus*, that no official act of a foreign power has any effect within the national boundaries. According to the said doctrine, foreign laws are no laws, foreign Courts are no Courts, foreign judgments are no judgments; enforcement is only admitted *ex comitate*. I do not translate "comitas" not even by "comity", on account of the vagueness of the meaning. It may have all the significations, which are between "courteousness towards another State" and "consciousness of a duty towards mankind". As to foreign laws, the antique doctrine has lost all credit, but with regard to foreign judgments it is still alive. I am inclined to concede an historical importance to the above mentioned *strictum jus*, but both the doctrine and the exception, in sofar as comity means courteousness towards States, are according to my opinion, contrary to the reasonable principles of international social life. The jurisdiction of a State, which is the local representative of mankind, is a limited one, and the State, as I have pointed out in § 35, has the reasonable duty of recognizing the other States as representatives of mankind in their sphere of competency. Therefore, if a foreign State has, with relation to a civil law-suit, a *reasonably founded jurisdiction*, the judgments of the Court of such a State are to be recognized in principle, by other States, as sources of rights, and on the same basis, foreign States ought to collaborate to the execution, such an execution being a requirement of the reasonable order of international social life.

Positive laws and practice. The various systems of the positive laws, especially those of the Dutch, French, English, American, German and Italian laws, have been compared with the greatest care, and it would be useless to recapitulate the work of my predecessors. The only point I wish to emphasize is the importance of the jurisdiction in the matter. Some laws are speaking of "competency" and are even giving a prescription, regulating which law is to be applied as a measure of the "competency" of a foreign court, but the real meaning is not competency in its narrow sense, but jurisdiction, in the signification given to the said word in § 32. Some of the legal systems relating to the execution of foreign judgments are of a radical character; in principle they refuse the execution, but they do not object to the in-

troduction, in an inland Court, of a new law-suit on which the former foreign judgment is not entirely without influence. In contradistinction, at least apparently so, to the said radical system, we find many legal systems in principle granting the acknowledgment and the enforcement of foreign judgments, but under such conditions that a new law-suit in an inland Court — generally an abridged suit — is necessary, in order to ascertain whether some legal conditions are fulfilled. Such a new law-suit may lead to a grant of execution or *exequatur*. The conditions, imposed on foreign judgments, in such a case, are numerous and various. Besides the condition of jurisdiction (competency) we find the requirement that the defendant, especially when he is a subject of the lawgiver, must have received a regular notice of the claim, that the rights of the defendant in the procedure, must have been upheld etc.. Sometimes, the local law stipulates that the foreign judgment must not be contrary to public policy or to morality, or that it must not be impeachable for fraud. The condition of reciprocity is often put down in the law, as a remnant of the old "comitas". But the number and the variety of the conditions cannot conceal the main condition to be that the foreign court must have had a reasonable jurisdiction as to the primary contestation. The domineering importance of the jurisdiction clearly appears in the English and American practice, as has been exposed in the works of the best text-writers and in the cases referred to. The distinction between foreign judgments in *personam*, *in rem* and *de statu hominum*, a prominent figure in the Anglo-american practice, is closely connected with the question of a reasonable jurisdiction.

International treaties. Those are numerous too and their particularities have been fully exposed in the literature. A mere glance at the said treaties will convince the reader that, in the treaties also, the jurisdiction is the main point. The Hague treaties on civil procedure have only given a solution of the question with relation to the costs and the so-called *cautio judicatum solvi*. In the Bern treaty, concerning the carriage of goods on railways, we find, however, a prescription concerning the enforcement of foreign judgments, *on the basis of a regulation of the jurisdiction.*

The evolution. It is gradually developing into the new laws,

the international treaties and the cases decided by the Courts, but a real international judicature-union still seems to be far away. Two chief impediments are retarding the evolution. The first is the lack of an international regulation of the jurisdiction, at least of an enumeration of the cases in which the jurisdiction of a foreign Court should be generally recognized. The second impediment is international distrust. The power of resistance of the first impediment may be measured; the same thing cannot in our days be said of the second.

Foreign arbitral awards. I have discussed the matter in general, in § 37, and I only revert to it in order to point out that here we do not find the same opposition between the reasonable principles and the positive law, as we have ascertained in the rubrics relating to judgments. A foreign arbitral award is very generally considered, in normal cases, as a fixation of the point of law and, although it may be in an indirect way, the execution of the award is, as a rule, granted. If we ask ourselves what may be the reason of this state of things, we find that, in normal cases, there is no doubt *about the jurisdiction of the arbiters*. The international treaties, relating to judgments, generally contain a regulation concerning arbitral awards.

Eighteenth Section.

BANKRUPTCY.

§ 72. *General Remarks.*

Bankruptcy and civil procedure. Bankruptcy, in the most general sense, is certainly connected with the law of civil procedure, and it may be considered as a sort of attachment of an estate in the interest of the collectivity of creditors. It is, however, not at all an ordinary attachment. In the first place, it is embracing a fortune as a whole, in the second place, it attaches without material apprehension of the goods, and in the third place it produces de facto a community of entangled interests, of which the creditors are members, and in which the individual advantage of each creditor is subordinated to the common benefit of the collectivity. So the com-

parison of bankruptcy to an attachment is a very inperfect one.

Bankruptcy and commercial law. There is no necessary relation here, but many positive laws have established such a relation, not without historical inducements. According to the laws I have in view, only a trader can be adjudged a bankrupt. Sometimes the laws have introduced a legal status, similar to bankruptcy, for non-traders. There are various names for it. It may be called a legal state of manifest insolvency. The diversity of the laws, on this point, is certainly one of the impediments on the way to an international agreement.

Bankruptcy and criminal law. An historical link is also to be found here. Originally, many bankruptcy laws had the chief design of inflicting a rigorous punishment on misdemeanours, committed by traders to the detriment of their creditors. The roots of the distinction between traders and non-traders are deeper in the criminal law than in the general civil law. In some countries, where the disparity between traders and non-traders has been abolished in the general civil law, some acts, only to be committed by traders, are liable to punishment, as, for instance, the non-observation of the legal duties relating to book-keeping or even excessive domestic expenditures. It is scarcely questionable that an alien, domiciled in such a country and acting as a trader, may be eventually punished there according to the local law. It must also be called to mind that bankruptcy, in so far as it is a crime, may be an inducement to extradition and that, in countries where the extradition of the own subjects is excluded, such a subject, after having committed a crime connected with bankruptcy in a foreign country, may take a refuge in his native country and be brought there before a local magistrate. But it may be said that, in general, the prescriptions of criminal law concerning bankruptcy are not of very great importance to international social life.

Juridical institutions similar to bankruptcy or connected with it. They may tend either to the prevention of an adjudication in bankruptcy or take the place of it. Some laws have regulated preventive measures, as the legal moratorium or the compulsory composition. As a substitute for bankruptcy, I have already mentioned the state of manifest insolvency, other substitutes are the liquidation by arran-

gement and the compulsory winding-up. The above mentioned institutions, all belonging to the positive law, are certainly not without importance to international social life, but, considering their accessory character, I take the liberty to concentrate my investigations on the main thing, the bankruptcy.

§ 73. *The reasonable Principles of the international Bankruptcy Law.*

Synopsis of the theories in vogue. I beg to say openly that I shall not answer the question whether bankruptcy belongs to the *statutum personale* or to the *statutum reale*, as I consider the method, leading to such a question, as a scientific failure. The two theories I wish to oppose to each other are the theory of the *unity-universality* and the theory of the *plurality-territoriality*. I take the liberty to use appellations, immediately derived from the latin — or the italian — language because these appellations are so clear, that it is scarcely necessary to give definitions and to insist on the opposition.

The "unity-universality" theory. The supporters of the theory are asserting that, for each debtor, only one adjudication as a bankrupt is to be admitted, and that such an adjudication includes and attaches the debtor's entire fortune, the situation of his goods being quite indifferent. As to the jurisdiction, the publicity and the respect of regularly acquired rights, the supporters do not entirely agree with each other, but they are considering such questions as accessories, the unity-universality being the main point.

The "plurality-territoriality" theory. Here, the starting point of the supporters is the thesis that bankruptcy, as to its civil consequences, is a general judicial attachment. Therefore they are contending that a Court, the imperium of which is limited to the territory of a State, can only seize and keep the goods lying in the territory of the State, in which the Court is sitting. Goods lying in another country are free, and, therefore, if the estate of the insolvent debtor is disseminated, as many adjudications would be necessary as there are States, in which goods are lying. The question of the jurisdiction, the publicity and the respect of regularly acquired rights are, here too, generally

considered as accessories. Many supporters of the plurality-theory, however, do not exclude the conclusion of international treaties, giving, under certain conditions, more or less effect to a foreign adjudication in bankruptcy.

The reasonable principle. After having duly applied the winged words "*audi et alteram partem*", I modestly come to what I call the reasonable principle. My opinion is that the jurisdiction, the publicity and the respect of regularly acquired rights are not accessories, but parts of the principle. The adjudication has to be pronounced by a judge reasonably entitled to jurisdiction, that is a *conditio sine qua non* of every international effect. There ought to be a good international publicity. And the principle of the international effect of an adjudication is that the entire estate has to be distributed, under the supervision of authorities entitled to a reasonable jurisdiction, after a good publication, among all the creditors, respecting, as far as possible, the regularly acquired rights of each of them. The two abovementioned theories are now appearing in their true character; they are means, only justified if they lead to the realization of the reasonable principle, without any more ado and without any more costs than are necessary. If the estate of the bankrupt is concentrated in his domicile, or, if he is a professional man, in his place of business, the Courts of the country, where are the domicile or the place of business, are entitled, in principle, to an exclusive jurisdiction, and the question of the publicity and the respect of rights and claims must be solved, not by a mechanical reference to one and the same law, but in accordance with the requirements of a reasonable international social life. If on the contrary, there are more places of business in various countries, a plurality of adjudications is not excluded, even if one of the establishments is the principal one. In such a case one of the adjudications may be considered as the principal one and the others as secondary ones, and a collaboration of the trustees or assignees will realize the principle with as little ado and as few costs as possible.

General observations as to the application of the reasonable principle in the positive laws. Two very important things must be

emphasized. The first is, that the State, acting in isolation, is not in the same position, with regard to the application of the principle, as a union of two or more States. The State, in its isolation, cannot change the juridical figure of the world, it has to be satisfied with a relatively reasonable solution. Very often the debtor, who has become a bankrupt in the State, will have possessions or claims abroad; inversely a debtor, who has been adjudged a bankrupt abroad, will often have inland possessions or claims to be collected in the interior. The law may be silent, but the inland judge has to speak. In one of my works, edited some years ago, on the codification of the international bankruptcy law, I have examined the various questions arising before an inland Court, and I here take the liberty to refer to it. But I must call the attention to the second important thing. A distinction is to be made between the questions of international law arising in the interior and connected with an *inland bankruptcy*, and questions of international law, also arising in the interior, but connected with a *bankruptcy adjudged in another country*. I have made such a distinction in my former work, and it is still my opinion that the practice also ought to make it, not because I have made it, but because international life makes it. In the following paragraph, the last of the system I shall take the said distinction as the basis of a few observations.

§ 74. *The positive Laws and their Evolution.*

Questions of international law, arising in the interior, and connected with an inland bankruptcy. The rubric is long, but clear, I hope. The first question to be discussed is the question of the jurisdiction, an international question, the question of the "competency", being only a municipal question. Every inland Court may have to decide, even when the law is silent, which debtor may be adjudged a bankrupt in the country where the Court is sitting. In conformity with the reasonable principle, the main basis of the jurisdiction is the domicile or eventually the place of business, but the lawgivers, desirous to facilitate the petitions of inland creditors, have established

many subsidiary foundations of an inland jurisdiction. A secondary establishment or a dwelling-place in the country, a former domicile or a former place of business may be sufficient. (Lord Halsbury in *Cooke v. Charles A. Vogeler Company*, 1901. A. C. 102). It has been sustained, — in my eyes this is the acme of the extension, — that the nationality of the debtor, in connection with the nationality of the petitioning creditor, could be the foundation of an inland jurisdiction. Be that as it may, the extension of the national jurisdiction is an impediment to an international agreement regulating the jurisdiction. A second matter of interest is the publicity. Advertisements may be inserted in foreign papers, but the difficulty connected with such advertisements is the question if they are justifying the presumption that persons, domiciliated abroad, have had due notice of the state of affairs of the bankrupt, and, if so, from which date. We find a third important question in the influence of the inland adjudication on the goods of the bankrupt, lying abroad, for instance on claims of the bankrupt on persons domiciled abroad. We have seen, in the foregoing paragraph, that this influence constitutes a disputed matter. My intention here is not so much to give an answer to that question, as to point out that *the inland courts will be obliged to give an answer*. Last not least, there are the questions connected with the various kinds of claims of the creditors, especially when the creditors are persons domiciled abroad. Letting alone some exceptional provisions, there is in so far "universality" with regard to the liabilities of the debtor, that all the creditors are admitted on equal terms. But the claims are presenting many and many graduations, there may be claims dependent on fixed times, conditional claims, preferential claims, claims secured by a mortgage or a bail etc.. The consort of the bankrupt may have his or her rights too. It may be easy to cut through all these claims, at least with relation to movable goods with the heavy and sharp axe of the *lex fori*, but I should think that it is much better to untie the knots in accordance with the requirements of a reasonable international life. The practice will here find a large field of action and, in so far as the *lex fori* may be silent as to international complications, an international case-law may lead to a settled international-common law.

Questions of international law, likewise arising in the interior, but connected with a foreign adjudication. This aspect of the question has often been considered, by the text-writers, as if it were the only one. The opposition between the theory of the territoriality and that of the universality is very important here. The territoriality doctrine will withdraw the goods lying abroad from the activities in distribution, so that, in principle, the bankrupt will have the free disposition of the said goods, and any creditor will be able to attach and sell them for his individual benefit. The universality-doctrine would bring us nearer to the reasonable principle here. In some countries the adjudication is considered as an alteration of the personal capacity of the bankrupt, with the consequence, *at least when the debtor has been made a bankrupt in his own native country*, that his "incapacity" ought to follow him everywhere. Sometimes a distinction is made between movable and immovable goods, and whilst, with relation to the former a kind of "extradition" is admitted, the latter are considered as esclusively governed by the *lex rei sitae*. It may be also that the local law has given the opportunity to attach to a foreign adjudication a grant of execution or exequatur. In every case wherein it is sustained that the foreign adjudication ought to have any effect in the interior, the question of the reasonable jurisdiction of the foreign Court will arise. As long as the theories in vogue will preserve their authority, an international agreement seems uncommonly difficult. Perhaps the judicial cases may gradually prepare an international-common law.

Arrangements between the bankrupt and his creditors. It is a very interesting matter, but I shall only mention it as something to think over. A distinction between an inland arrangement and a foreign one must also be made here. In so far as a Court has to do with an inland arrangement, it is very probable, as all the creditors, have had the opportunity to take part in the proceedings, that the Court will consider the regular inland arrangement binding as well for the foreign creditors as for the inland ones. The same thing may be said with relation to a judicial discharge. But it is not at all certain that the Court will admit the effect of a foreign arrangement or discharge.

International treaties relating to bankruptcies and to arrangements. These are numerous. Treaties concerning foreign judgments in general are often making a special mention of adjudications in bankruptcy. The treaties between France and Switzerland (1869) and between France and Belgium (1899) are particularly remarkable. In the Hague conferences for the codification of private international law a draft-treaty has been elaborated, to be concluded between two States. As to a general treaty or a large union of States, the Conference was of opinion that the world was not yet ripe for it. In our days it is certainly still less ripe than it may have been before THE WAR.

CHAPTER III.

A FEW CONSIDERATIONS ON THE POSITIVE LAW OF WAR.

The positive nature of the law of war. There is no reason why the complex of relations, connected with war, should not be called *a law*. It is a law, but only a positive one. Its rules are to be deduced exclusively from customs or written ordinances; their basis in on no account the reasonable order of international social life. Therefore, the reasonable principles of social life are neither touchstone nor final aim of the evolution of the law of war. The number of wars, however, may be reduced and the rules of warfare humanized; it is not even impossible that warfaring may altogether disappear.

The dogma of the righteous causes of war. With the illustrious name of my countryman GROTIUS this dogma is connected, and I certainly consider it as a most valuable historical monument, but its chief practical importance is to be found in the fact, that it has been an introduction to the doctrine of the permitted and prohibited means of warfare, and only as such it will be dealt with in the following lines. The measure of the righteousness of the causes of war, in the works of the scientists, has been taken from the philosophy of the social life of private individuals, with substitution of the States, considered as individual members of a postulated society of States, for the private individuals. The above-mentioned righteous causes of war, deduced in the said manner, are the so-called *natural law of the struggle for life*, the doctrine of the *lawful selfdefence*, that of the *compulsive emergency* and, last not least, a combination of the two last mentioned doctrines, the theory of the *necessary selfhelp in a peculiar law-suit between States*. With a reservation as to special cases of self-defence and emergency, I beg to emphasize that none of these causes

is a justification of individual brute violence. As to the *struggle for life*, the question whether the struggle between living beings is a law of nature may be left out of discussion, as it is certainly adverse to the fundamental principles of a reasonable life that this struggle should be fought by means of violent extermination of the competitor. With regard to *lawful selfdefence* and *compulsive emergency*, I beg to say that both institutions undoubtedly exist in a perfect organization of human society, but only in those cases which answer to strict objective conditions, so that no subjective analogical extension may be allowed. Selfdefence and emergency are exceptions, confirming an opposite rule of reasonable social life. Besides, neither selfdefence nor emergency are a reasonable measure for permitted or prohibited violent means. Subservient means of defence and useful means to escape from the state of emergency are allowed means, but only the circumstances of each individual case may settle exactly in how far something is subservient or useful. As I have pointed out before, a combination of selfdefence and compulsive emergency has created the theory of the *necessary selfhelp in a peculiar law-suit*. It is my intention to explain this theory in its full strength, without any misrepresentation. According to this theory, a State, being of the opinion that it has endured a wrong from another State or that it is being threatened with such a wrong, and being aware of the fact that there is no impartial and predominant human judge, must necessarily act as plaintiff, judge and executory officer at the same time; in this way, the compulsory violence is simply the execution of the sentence in favor of the plaintiff. This doctrine might be considered as being settled by the international customary law, if the acts and the unanimous convictions of the strong States should be a sufficient basic principle for an international custom. Strong States are generally acting in the conviction that their own sentence *in re sua* is a lawful and an executable sentence. But their doctrine is entirely in contradiction with the reasonable principles of international social life, as the winner of the suit is by no means the one whose claim or defence is righteous but only that one whose arm is the stronger. Injustice absolutely has the same protection as justice. The comparison of the violent law-suit

with a duel does not justify the doctrine. The appeal to the ordeal, an appeal which is very often heard in old and in modern warproclamations, is left out of discussion as a matter of faith, and is therefore only mentioned incidentally. The conclusion which may be drawn from the idea of a law-suit, that some rules of warfare must be observed by the plaintiff and the defendant, is only just in appearance. Forms must certainly be observed by the parties in a regular law-suit, but the law-suit here is not regular, and the plaintiff, lawgiver and judge *in re sua*, is only observing those forms that suit him. One thing only could be logically deduced from the idea of a law-suit, even of an irregular one, which is the idea that war, being a law-suit between two States, does not affect the juridical condition of the other States, and does not even imply any violence against private individuals, especially if they are subjects of a neutral State. It may be that such an idea has had a remote influence on the customary rules concerning the means of warfare, but as will be explained in the following rubric, such customary rules are the outcome of quite different causes.

The causes of the development of customary rules, concerning warfare. Here it will be enough to mention three principal causes, viz. ethical feelings in general, Christian fraternity and military honour. Morality is averse to bloodshed, and a moral man, although he may consider war as a necessity, will try to make the means of warfare as human as possible. Christian morality has exerted its influence in the same direction, but Christianity has also contributed in another way to the development of human customary rules. Wars between Christian States have taken place frequently enough, but as the Christian nations were enthousiastically uniting their forces against the infidels, the idea that a war between nations, united by the same faith, had to be conducted with as little cruelty as possible, became a common conviction of the "family" of Christian States. The duty to abstain from many acts has also been enforced by military honour, especially in the age of chivalry. The customary rules, which have been derived from the said causes may be summarized as follows.

The first customary rule: "Not all means to injure a foe are allowed". The rule is framed in a negative form, on account of the casuistic development of the custom. As examples of prohibited things I may mention the command to finish the wounded, the misuse of the flag of truce, the breach of an armistice etc.. I could add the assassination of hostile sovereigns, rulers or commanders, the use of poisoned weapons, and perhaps the use of weapons causing unnecessary sufferings. Multiplying the examples would not lead to an accurate rule, as custom has never been able to produce such a rule. Besides all the schemes were made null and void by retortion, admitted by custom.

The second customary rule:" "Private individuals ought as a rule, but as a rule with exceptions, to be exempted from warlike harm". The lack of precision is here to be seen in the formula. As to the explanation of the rule it will be sufficient in the present appendix, to mention the titles of the chapters, that are to be found in the ablest handbooks, viz. the chapter on occupation of hostile territory, the commerce with hostile individuals, the private rights of the said individuals, and, above all others, the commercial relations at sea in time of war. This last chapter, in the customary law, is showing a very perceptible lack of precision.

The third customary rule: "Neutrals have rights and duties. Superficially observed, the rule seems simplicity itself, neutrals are bound to remain.... neutrals. But in reality the thing is very, very knotty, especially here in the customary law. Neutrals, for instance, must be entitled to defend their neutrality, without giving it up. The main difficulty, in the customary law, is that concerning the neutral subjects. Even the conception of the "neutral subject" is not exactly defined in the unwritten law; nationality as well as domicile may be the criterium. Neutrals are, in the first place, obliged to conform to the regulations of the neutral State, to which they may belong in one way or another, but they will be compelled also to obey the regulations of the belligerent States. The handbooks, based on the doctrine that the only subjects of the international law — or law of nations as they call it — are the States,

are obliged to follow a circuitous way in order to construct a juridical relation between a belligerent State and a neutral individual; they affirm that neutral subjects are bound by the prescriptions of the belligerent States, in so far as these States are entitled, by the rules of international law, to enact such prescriptions. The lack of precision is very perceptible in the customary law of the maritime trade of neutrals. It will be sufficient to mention here the titles of the chapters relating to "blockade", "prizes" and contraband of war".

Consequence of the lack of precision of the custumary rules. As there are no reasonable principles, which may serve to the construction and the completion of the customary rules, the States, inspired by the highest considerations of morality, by aversion for useless cruelty and by military honour, have tried to take the only way out, viz. the way of codification.

The codification of the law of war. For the reader, acquainted with the events of the years 1914 to 1918, mentioning the rubric would really do. The literature is very rich. Many valuable works have preceded the celebrated Hague Conferences. I shall only mention the treaties of Bern (1864 and 1906) relating to the red cross, and the declaration of Paris (1856) concerning maritime warfare. The Hague ordinances are remarkable, both with regard to their form and to their contents. Many rules on many subjects have been laid down in the Hague treaties, inter alia the means of preventing wars, warfare on land, on the waters and even in the atmospheric regions, and neutrality. I shall not enter into a discussion and I only beg to remark that between the clear words of a rule, elaborated in the cool time of peace, and the practice of the same rule, in the intense heat of passion, an unfathomable gulf is yawning.

A short digression to the domain of feelings. I already had the opportunity to say that according to my opinion feelings, especially when they have become passions, have more power over the majority of men than reason. For this a digression is necessary. I shall speak freely, as an impartial observer of social life. The feelings I have in view are the principle of the nationalities, the national feelings grown into a passion, the human races, the religions and

the social-political parties. I must especially scrutinize the influence of the races of men, the religions and the social political parties on the passionate national feeling. We shall see that this influence is working in two entirely contradictory ways, it is, on one side, an inciting influence, and, on the other side, a softening one. This is illogical, but we are in the realm of feelings, where sentiment is taking the place of thought.

The principle of the nationalities. It is scarcely necessary to say that the said principle is quite another thing than the principle of nationality, well-known in private international law. The principle of the nationalities has as its theoretical foundation the idea that there ought to be parallelism between nations and States; its aim is to give to each group of men, united by a common national feeling, the sovereign rights of a State, at least the relative sovereign rights. In international life the principle is a highly explosive matter. Its influence may be characterized by a few names with latin etymology, as secessions, annexations, desannexations, reannexations etc.. These results, generally, are only to be attained by martial violence. Very often the principle of the nationalities has been the cause of abuses. It is most difficult to say, with impartiality, where the feeling of provincial autonomy ends and that of national sovereignty, leading to a secession, begins. Besides, the boundaries of the national groups are far from being traced exactly and in many regions a mixed population is living.

The national feeling inflated to passion. In general, I beg to refer to the §§ 4 and 20. When the national feeling is incited artificially, in the education and under the daily influence of the surroundings, by means of blackening the character of other nations, and, moreover, when juridical and economical privileges are granted, in contradiction with the requirements of a reasonable international life, to the own citizens, the sound national feeling, a concentration of the love to one's fellow-beings, is polluted by hatred, viz. the pleasant feeling connected with the sufferings of another nation. This hatred is also an explosive matter. The economical competition, conducted in a way which is in conflict with the reasonable principles, is leading

to colonial expansion with the aim of sweating the colonies, to protectorates, suzerainties, spheres of influence etc.. It is easy to understand what the result will be. The economical selfishness is also the source of an ardent desire of continental or universal hegemony. Such a supremacy may, in theory, secure the reasonable order of international life, in the same way as a wise autocrat may secure the social life in a State. But who will be the judicious tyrant? If there is more than one pretendent, the big guns are trumps.

The races of men. Their existence is undeniable, but their limits are not sharply traced and their importance has been exaggerated. For the rest, imaginary racial differences have quite as much power over men as real ones. The consciousness of racial differences, is especially in colonial empires but not exclusively in such regions of the world, the source of a strong feeling of disdain or even aversion towards a part of one's countrymen. As such, it is also the origin of a feeling of hatred, directed towards aliens, because the common hatred to the outer world conceals the lack of cohesion of the national group. On the other side, as the real or imaginary racial community is very often extending itself far beyond the frontiers of a State, the racial feeling is the source of a racial, eventually continental patriotism, and as such it has a conciliatory influence on international hatred. As we have seen, these two contradictory influences are not absolutely inconsistent with each other in the realm of feelings. So we see that the members of the white race are sensitive to the yellow peril, whilst the feeling of a racial community is increasing in the yellow world. As to our black brothers, they have not yet had their day.

The religious feeling and the religions. The religious feeling, considered in itself, has three exquisite elements, faith, hope and fraternity. Faith is the conception of an idealistic order of the universe, hope the brilliant representation of future bliss, fraternity the delicious sensation of being beneficial to one's fellow-men. The religious feeling is essentially universal, it is cosmopolitan in the best sense of the word. But the positive religions have the double influence pointed out in the foregoing rubric. Unfriendly feelings are disturbing

the national cohesion, with the usual reaction in the international sphere, and, on the other side, the supernational community of faith is uniting the members of the various nations or even the inhabitants of a continent in a strong confraternal spirit.

Social-political parties. *Mutatis mutandis* the conclusion of the foregoing rubric also holds good.

Synopsis of the principal causes of war, connected with the realm of feelings. I wish to point out the three following causes:

I. It is exceedingly difficult to come to a political division of the world, harmonizing with the national feelings of every group of men.

II. The economical competition between the States is often conducted in a way, entirely disagreeing with the requirements of a reasonable international social life.

III. The national cohesion, in the domain of the feelings, is often so defective, that the cement of a common hatred to other nations is necessary to conceal it.

The reduction of the number of wars. A progressive diminution of the causes of war will have, naturally, the result indicated in the rubric. For the rest, I beg to refer to § 38, concerning international arbitration.

Humanization of the war. I here refer to the considerations of the present chapter, relating to customary and written rules of warfare. The idea that war is a struggle for life, leading to a violent extermination of the feebler by the fitter is, in itself, so bestial that a reaction, in favor of humanity, could not fail to come. But a complete humanization is unattainable and can never be the final aim of an evolution. The ideal can only be the complete disappearance of the war.

Disappearance of the war. In theory the question of the disappearance of war can be solved with almost mathematical accuracy. I here refer to the whole of my systematical work. The war will disappear as soon as the juridical community of mankind will have a complete organization, with a central power acting, within the limits of the relative sovereignty of personified mankind on the human spe-

cies, for the sake of the reasonable order of social international life, with such a compulsive power that the violent resistance of any political group would be reasonably impracticable. Most formidable impediments, however, are in the way ,and it cannot be emphasized too strongly that these impediments are not only juridical ones, but that they belong, to a great extent, to the realm of the feelings. The latter offer the strongest resistance. I am aware of the fact that THE WAR has not only had a disjoining effect as to former enemies, it has also more closely united the former allies, but such a mixture of horror and affection is not a good basis for a general organization. Besides, I do not forget the former neutrals. Their group may at length realize, in the realm of the feelings, a radical change. Without such a change the organization will last.... as long as it will last.

CHAPTER IV.

SYNOPSIS OF MY CONCLUSIONS.

A glance back at my starting point. I beg to remember that the starting point of my work was the idea that private and public international law, to which latter I do not reckon the positive law of war, have the same nature and are two branches of one science. Private and public international law, according to my opinion, are nothing else but private law and public law, considered from the point of view of a juridical community larger than a State, a community embracing, in its utmost extension, entire mankind. The two branches of international law have therefore, the same foundation, viz. the juridical community of mankind. It is my conviction that the community, society or family *of the States* is not the true basis for international law. Such a community is too narrow for it. There are, undoubtedly, juridical relations between States, but these relations are not primary and fundamental, they are, on the contrary, deduced from other relations founded on a much deeper basis, the juridical community of mankind, on which the whole body of human society is established. The States are local sovereigns, subjected to duties and entitled to rights as such, but they have also common duties towards mankind and are exercising, as a collectivity, the high powers, correlative to their common duties, on all the members of mankind. This community of duties and rights is the link between the States. Relations *between States* are therefore only a part of the international law, the other parts are *relations between States and men* and *relations between men*, provided that the relations between States and men and those between men are considered from the point of view of a juridical community larger than a State.

The aim of my work. From the requirements of the reasonable order of social life in the juridical community of mankind, in which community the States, the unions of several States, and the collectivity of the States are exercising public powers, I have deduced what I called the reasonable principles of international social life. In order to avoid being qualified as a dreamer, I have emphasized that, in my opinion, the reasonable principles of international social life are absolutely subordinated to the positive, customary or written law. But I have also emphasized, with equal stress, that the same reasonable principles have not only their importance as subsidiary and interpretative instruments, but that they are also the touchstone of the righteousness of the positive law and the final aim of its evolution. Therefore, a renovation of the international law may be founded on the said principles.

My method. In the eighteen sections of my system, I have examined the vital questions of international social life. Patiently and systematically, not fearing, where repetitions were necessary, to point out the same thing several times, but, on the other side, strictly avoiding sideways leading to the details of the things, I have compared, with regard to the said vital questions, the reasonable principles with the positive law. Where I have found a diversity, I have scrutinized, as an impartial observer, whether a beginning of an evolution was to be ascertained, and, if not, which impediments obstructed the way and how great their power of resistance might be. This method I called the experimental method. The vastness of the subject-matter will easily make clear to the reader, why I have abstained from bibliographical reviews and confined the quotations to a minimum.

My results. As to the value of my work I leave the verdict to the readers. I hope there will be readers enough to act as a jury in case of need. But although, as the author, I may not be impartial enough to deliver a verdict, I should like to point out the three following things, as a defence before the jury. I hope, in the first place, to have given better notions of public and private international law than are the classical notions. In the second place, I trust to have traced with accuracy the juridical, territorial and personal limits of the

sovereignty of the State. And, last not least, I flatter myself with the hope to have shown that on the basis of a juridical community of mankind a general system of international law can be established, purporting to be more than a classification, in sections and paragraphs, of the more or less generally acknowledged rules of positive law. If I have attained the above-mentioned results, my work will be a valuable contribution to the renovation of international law. Finally, I dare say that my considerations on two very important topics, the national selfishness and the war, may have set the reader thinking. As to the said topics I should like to say a few more words.

National selfishness. I hope to have carefully avoided here any misapprehension. The existence, or rather the full organization of the juridical community of mankind, is perfectly consistent with a noble emulation between the States. But too often, in positive law, a form of selfish competition is to be found, in which the only point of consideration is the successful end of a struggle, so that the conformity of the means with the reasonable principles is entirely disregarded. As far as the above-mentioned second form of emulation, however censurable it may be, is put into practice in a positive law, the reasonable principles are undoubtedly overruled. I have never admitted a conclusion contrary to it. But censurable national selfishness can by no means be the touschstone of the righteousness of positive law and the final aim of its evolution. National selfishness is a powerful psychological moving-spring, and a very strong impediment on the way of evolution. As such only, I took it in consideration.

The war. In my work it is only a phenomenon of international social life. Very often, in the various sections of Chapter II, I have examined the influence of war. This influence is working generally in the wrong direction, but sometimes a pushing power, in the direction of the reasonable principles, is to be ascertained. This last statement is by no means a glorification of the war. The war, in my eyes, has the strength and the discernment of a typhoon, the great wind or "taï foon" of the Chinese. It throws down and smashes many valuable things, but is also roots up sometimes, by a single pull, prejudices which otherwise would have resisted a century. I am of opinion that

the last influence has been working as to the absolute sovereignty of the States. The idea of a social organization of mankind has been brought, by a single pull, from the ethereal realm of dreams to the solid rock of immediate possibility. From the juridical, territorial and personal sovereignty of the State, such an organization will not take away a hair's breadth more than is required by the reasonable order of international social life, but as far as such a limitation is required, it must be undergone for the benefit of mankind.

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